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Supreme Court of the United States

OCTOBER TERM, 1961

No. 464

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.s.

WASHINGTON ALUMINUM COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 2, 1961
CERTIORARI GRANTED DECEMBER 4, 1961

Supreme Court of the United States

OCTOBER TERM, 1961

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NATIONAL LABOR RELATIONS BOARD,
PETITIONER

vs.

WASHINGTON ALUMINUM COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

*On Petition for Enforcement of an Order of
the National Labor Relations Board*

JOINT APPENDIX—Filed October 14, 1960

[fol. 1] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

126 NLRB No. 162

Case No. 5-CA-1498

WASHINGTON ALUMINUM COMPANY, INC.

and

ROBERT A. HEINLEIN

FRANK J. ADAMS

**FRANK S. REED
FRANK OLSHINSKY**

FRANK OLECKINSKI
WARREN A. HOVIS

AUGUSTINE AKAAYBOUY, S.R.

AGUSTINE H. PATRICK,
WILLIAM GEORGE, JR.

WILLIAM GEORGE, JR.
J. ALFRED R. CARON

J. ALFRED R. CARON

Case No. 5-RC-2682

WASHINGTON ALUMINUM COMPANY, INC.

EMPLOYER

and

**INDUSTRIAL UNION OF MARINE & SHIPBUILDING
WORKERS OF AMERICA, AFL-CIO
PETITIONER**

DECISION, DIRECTION AND ORDER—March 31, 1960

On September 11, 1959, Trial Examiner Louis Plost issued his Intermediate Report and on September 18, 1959, an Erratum in the above-entitled consolidated proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report and Erratum attached hereto. The Trial Examiner further found, in effect, that the challenges to certain ballots in the representation proceeding should be overruled. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the brief, and the entire record in this proceeding¹ and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modification.

The Trial Examiner found, and we agree, that the Respondent violated Section 8 (a)(1) in terminating the employment of the 7 complainants who were engaged in protected concerted activity under the Act. We rely, *inter alia*, upon the following: the credited testimony of employee Hovis that "We all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way;" the credited testimony of employees Heinlein, Caron and George as to previous complaints made to the Respondent's foremen [fol. 2] over the cold working conditions, and to the effect that the men left on the morning of January 5 in protest of the coldness at the plant; and the evidence that the 7 complainants left the shop at approximately the same time.²

Case No. 5-RC-2682

The Challenges

The Trial Examiner found that Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux, Sr., and Warren A. Hovis, whose ballots were challenged, were entitled to vote. We agree, as they were unlawfully discharged or laid off before the election and, therefore, retained their status as employees eligible to vote.

¹ The Respondent's request for oral argument is denied as the record, the exceptions and the brief adequately present the issues and the positions of the parties.

² See *Southern Silk Mills, Inc.*, 101 NLRB 1, *enf'd* 209 F. 2d 155 (C.A. 6); *Metco Plating Co.*, 113 NLRB 204, *enf'd* 239 F. 2d 642 (C.A. 6). Cf. *Knight Morley Corp.*, 113 NLRB 204, *enf'd* 239 F. 2d 642 (C.A. 6), cert. denied 357 U.S. 927, involving Section 502 of the Act, which in our opinion would not be applicable in the instant case if alleged.

DIRECTION

IT IS HEREBY DIRECTED that the Regional Director for the Fifth Region shall, pursuant to the Rules and Regulations of the National Labor Relations Board, within ten (10) days from the date of this Direction, open and count the ballots of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux, Sr., and Warren A. Hovis, and thereafter prepare and cause to be served upon the parties a Supplemental Tally of Ballots, including the count of the challenged ballots, and take such further steps as may be necessary in accordance with the Board's Rules and Regulations.

ORDER

Upon the entire record in this proceeding, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby [fol. 3] orders that the Respondent, Washington Aluminum Company, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging concerted activities of its employees by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment;

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux,

Sr., William George, Jr., and J. Alfred R. Caron immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges; discharging if necessary any employees hired to replace them.

(b) Make whole said employees in the manner set forth in the section of the Intermediate Report entitled "The Remedy" for any loss of pay they may have suffered by reason of Respondent's discrimination against them;

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time [fol. 4] cards, personnel records and reports, and all other records necessary to analyze and determine the amount of back pay due;

(d) Post in conspicuous places in its plant in Baltimore, Maryland, including all places where notices to employees are customarily posted, copies of the notice attached hereto as Appendix.* Copies of said notice to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the Regional Director for the Fifth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

Dated, Washington, D. C. March 31, 1960.

BOYD LEEDOM, *Chairman*

STEPHEN S. BEAN, *Member*

JOHN H. FANNING, *Member*

NATIONAL LABOR RELATIONS BOARD.

(SEAL)

* In the event this Order is enforced by a decree of the United States Court of Appeals, the notices shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

[fol. 5]

APPENDIX TO DECISION, DIRECTION AND ORDER

NOTICE TO ALL EMPLOYEES

PURSUANT TO

DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage concerted activity by discriminatorily discharging any of our employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any other term or condition of employment.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

We Will offer to:

ROBERT A. HEINLEIN

FRANK J. ADAMS

FRANK OLSHINSKY

WARREN A. HOVIS

AUGUSTINE AFFAYROUX, SR.

WILLIAM GEORGE, JR.

J. ALFRED R. CARON

immediate and full reinstatement to their former or substantially equivalent positions without prejudice to

[fol. 6] any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination, discharging if necessary, any persons hired to replace them.

WASHINGTON ALUMINUM COMPANY, INC.
(Employer)

Dated _____ By _____ (Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

ERRATUM TO INTERMEDIATE REPORT—September 18, 1959

In the section of the Intermediate Report headed "Concluding Findings on Case No. 5-CA-1498," on page 7, lines 42, 43, and 44 of the Report in naming the discriminatees, the name of Robert A. Heinlein was inadvertently omitted. The names of the discriminatees at lines 42, 43, and 44, page 7 of the Intermediate Report are therefore corrected to include the name Robert A. Heinlein. On page 9, line 48, change No. 5-RC-1498 to read No. 5-RC-2682.

Louis Plost,
Trial Examiner.

[fol. 7] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 5-CA-1498

Washington Aluminum Company, Inc.

and

Robert A. Heinlein, Frank J. Adams, Frank Olshinsky,
Warren A. Hovis, Augustine Affayroux, Sr.¹, William
George, Jr., J. Alfred R. Caron. —

and

Case No. 5-RC-2682

**Washington Aluminum Company, Inc.
(Employer)**

and

Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO².

(Petitioner)

*Lawrence Wescott, Esq., and Bernard E. Orem, Esq., for
the General Counsel.*

Joseph Bernstein, Esq., Robert R. Blair, Esq., Leonard E. Cohen, Esq., all of Baltimore, Md., for the Respondent
Case No. (5-CA-1498).

Charles Yumkas, Esq., and Jacob Blum, Esq., of Baltimore, Md., for the Charging Parties Case No. (5-CA-1498).

Mr. Jack Gerson, of Baltimore, Md., for the Petitioner
Case No. (5-RC-2682).

Before:

Louis Plost, Trial Examiner.

¹ This Charging Party was inadvertently designated "Afferoyrux" in the Formal Documents. The correction is hereby made.

² The Union was inadvertently designated "International." The error is hereby corrected.

[fol. 8]

INTERMEDIATE REPORT

STATEMENT OF THE CASE

On February 26, 1959, a charge was formally filed in the Fifth Region of the National Labor Relations Board (Board) at Baltimore, Maryland, averring that Washington Aluminum Company, Inc., Baltimore, Maryland, (Respondent), had discriminatorily discharged certain of its employees on January 5, 1959, in violation of the National Labor Relations Act as amended. (Act)³ The matter was docketed as 5-CA-1498. Thereafter the Regional Director for the Fifth Region issued a complaint dated May 15, 1959, caused a copy thereof together with a Notice of Hearing, setting the hearing for *July 15, 1959*, to be duly served. The complaint alleged that the Respondent, by reason of the aforementioned discharges had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a)(1) and (3) and Section 2 (6) and (7) of the Act.

On May 21, 1959, the Respondent filed an answer.

The following information relating to a case docketed in the Fifth Region of the Board as Case No. 5-RC-2682 is not here reported as "findings" because it is not based on testimony adduced before the undersigned but reported as taken from the formal documents introduced at the hearing before the undersigned on *August 3-4, 1959*, and is here recited as necessary for a complete understanding of all matters to be covered by this Report.

On February 26, 1959 (the same date as the charge in Case No. 5-CA-1498 was filed) the Respondent and Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO⁴ (Union) signed a Stipulation for Certification Upon Consent Election, in the matter docketed in the Fifth Region as Case No. 5-RC-2682. The [fol. 9] formal documents do not disclose the date the

³ The employees named as having been illegally discharged were named as: "Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr. (corrected. See footnote No. 1) William George, Jr. and J. Alfred R. Caron.

⁴ This is the correct name of the Union. See footnote No. 2.

petition in 5-RC-2682 was filed. The Regional Director approved the Stipulation on March 9, 1959. On March 17, pursuant to the Stipulation an election was conducted, the vote as shown by the Tally of Ballots shewed 68 votes for the Union, 70 votes against the Union and 5 challenged ballots.

No objections were filed within the time prescribed by the Board's Rules, however on March 30, the Union objected to the ruling made at the election, by the Board's agent, with respect to the validity of two ballots as marked by voters; the Regional Director treated the Union's objection as Objections to the Conduct of the Election, affecting all matters disputed at the election. He ruled on the two ballots, on the eligibility of one of the voters challenged and as to the four remaining challenged voters, whose ballots were impounded he, under date of June 11, 1959, recommended to the Board that Case No. 5-RC-2682, be consolidated for hearing with Case No. 5-CA-1498 (in which he had issued a complaint on May 15, and which was set for hearing on July 15) the consolidation was asked "solely with respect to the eligibility to vote" of the four challenged individuals who are also named as discriminatorily discharged in the complaint in Case No. 5-CA-1498, the Regional Director's Report on challenges as made to the Board stating "the eligibility to vote of these four voters depends, therefore, upon the resolution of the unfair labor practice case."

On June 30, the Board ordered a hearing before a Trial Examiner "to resolve the issues raised on the eligibility to vote of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux * and Warren A. Hovis, and that such hearing be consolidated with . . . Case No. 5-CA-1498."

Pursuant to notice, a hearing was held on August 3 and 4, 1959, before Louis Plost, the duly designated Trial Examiner, at Baltimore, Maryland.

[fol. 10] The General Counsel, the Respondents and the Charging Parties (in Case No. 5-CA-1498) were all repre-

* The Regional Director ruled one of the challenged ballots valid. the count stood 69 for and 70 against.

* See footnote No. 2.

sented by counsel and the Union involved in Case No. 5-RC-2682 by its Regional Director.

All the parties participated and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Oral argument was presented by the General Counsel and the Respondent. A brief was received from the Respondent on August 27, 1959, and from the General Counsel August 31.

At the opening of the hearing the formal documents were introduced by the General Counsel, they consisted *inter alia* of the Complaint as issued in Case No. 5-CA-1498 and the answer filed thereto, the Board's Order for hearing Case No. 5-RC-2680 and the Order Consolidating Hearings.

No evidence was adduced except that required to sustain the allegations of the complaint in Case No. 5-CA-1498.⁷

At the close of the hearing the General Counsel moved to conform all the documents to the proof with respect to spellings, dates and like matters and to correct the errors as to the Union and Affayroux. The motion was granted. The parties argued orally. A date was set for the submission of briefs, findings of fact and/or conclusions of law.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

⁷ On August 18, 1959, the General Counsel moved to correct the transcript in certain particulars. No objections have been filed. The motion is granted and the transcript corrected as follows:

1. Page 15, line 2 insert the word "not" after the word "was" so that it reads "was not a supervisor."
2. Page 40, line 21—change the figure 80 to 8.
3. Page 60, lines 22 and 23—"We didn't stand in one spot work. We had to move around."—corrected to read "We stood in one spot and worked. We didn't move around."
4. Page 77, line 26—add the words "and get a doctor's certificate" so line 26 reads "And did you later go to the doctor and get a doctor's certificate?"
5. Page 90, line 7—change word "relief" to relayed."
6. Page 139, line 20—change the name "Caron" to "Tarrant" so that the name is "Ray Tarrant."

[fol. 11]

FINDINGS OF FACTS**Case No. 5-CA-1498****I. THE BUSINESS OF THE RESPONDENT**

The complaint alleged, and the answer admitted:

Respondent is and has been at all times material herein a corporation duly organized and existing by virtue of the laws of the State of Delaware, having its principal office and place of business at Baltimore, Maryland where it is engaged in the fabrication of aluminum products.

Respondent, in the course and conduct of its business operations, as described above, during the preceding 12 months' period, a representative period, shipped goods and materials of a value in excess of \$50,000 from its Baltimore, Maryland plant direct to customers located outside the State of Maryland.

Respondent is and has been at all times material herein engaged in commerce within the meaning of Section 2, subsection (6) of the Act.

II. LABOR ORGANIZATION INVOLVED

No labor organization is alleged to be, nor was any proved to be, involved in Case No. 5-CA-1498.

The formal documents in Case No. 5-BC-2682 show the petitioning union to be Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO.*

III. THE UNFAIR LABOR PRACTICES**The discriminatory discharges**

J. Alfred R. Caron testified that on January 5, 1959, he was a "leader" in the machine shop, had no authority to hire or fire employees, grant "time off" or give permission to leave the plant. Caron further testified that on Monday, January 5, 1959, he arrived for work at 7:10 a.m., [fol. 12] that the plant was very cold at the time; that he (as was his custom) went to the office of Foreman David

* See footnote No. 2.

N. Jarvis adjoining the machine shop; that he and Jarvis discussed "how cold it was and miserable"; that during the conversation two of the employees walked by the office window (which gave out into the plant) "huddled" and Jarvis observing them remarked "if those fellows had any guts at all they would go home"; that following this remark he (Caron) returned to the machine shop, noted that six of the eight men who worked there as machinists, namely the Charging Parties other than himself, were standing together "shaking a little, cold"; that he came up to them and:

I told them, I said, "Dave told me that if we had any guts at all, we would go home." And I said, "I am going home." I said, "What are you fellows going to do?"

Then they started talking among themselves saying, "Well, let's go."

And I started out first. And they were following behind me.

Caron further testified that as he was leaving he passed Jarvis to whom he said, "Dave it is too cold, I am going home."

Caron admitted he did not have permission to leave and was familiar with the standing company rule which required that permission of a foreman was required in order to leave the plant.

At about 9:30 a.m. Caron received a telephone call at his home from Jarvis who told him that on orders of *Fred N. Rushton*, the Respondent's president, the seven men who had left the plant that morning were discharged. Later in the day Caron came to the plant and removed his tool box.

Foreman Jarvis corroborated Caron's testimony with respect to Caron's conversation with him.

The six employees who followed Caron from the plant and who together with Caron are the Charging Parties herein * corroborated Caron. All testified that the plant

* Of these, Heinlein and George were called by the General Counsel. Adams, Olshinsky, Affayroux and Hovis were called as hostile witnesses by the Respondent.

[fol. 13] "Was extremely cold, that they had no permission to leave and that they knew it was forbidden by plant rules to leave the plant without a foreman's permission. All testified that they left the plant after Caron talked to them and after they had discussed the matter among themselves.

On direct examination as a hostile witness by the Respondent, Employee *Warren A. Hovis*, testified:

Q. (By Mr. Bair) Now, why did you leave the plant on Monday morning with these other men?

A. Well, they said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way.

There can be no doubt whatever on the record herein that on January 5, the Respondent's plant was somewhat colder than usual.

William George, Jr., testified that when he arrived for work on January 5, he found that ice had formed on the drain pipe of the spot-welder he operated in the machine shop.

Wilhelm Tafelmair, the one machinist who did not leave the plant with the other seven, testified that he worked in the machine shop, after the others left, wearing his over-coat, which he had put on at the suggestion of Foreman Jarvis and wore it at work until about 10:30 a.m.

Foreman *Jarvis* testified that when he arrived January 5, the plant was "extremely cold" and that the main furnace heating the plant was not operating; that at about 7:15 a.m. the plant's maintenance man arrived and got the furnace into operation but that "it was after lunch time" before the men then working in the machine shop could take off the excess clothing "bundling them up."

Vincent Battaglia, the Respondent's night watchman, testified that the heat in the plant was customarily shut off during the night and that he turned it on at 5 a.m.; that at 1 a.m. Sunday night the "big furnace" would not [fol. 14] operate, nor could he get it into operation at 5 a.m. when he again tried; that he reported this in the

morning to the maintenance man when he arrived who then "started working on the furnace."

Roy V. Rose, the Respondent's maintenance man testified that on January 5, at 7:15 a.m. he was informed that the furnace was not operating but that he had it repaired and operating within "15 or 20 minutes." Rose testified further that it would require $2\frac{1}{2}$ to $3\frac{1}{2}$ hours for the furnace to warm an area within a 50 foot radius of it after it began operating.

Apparently unusually cold weather was expected for Monday. Fred N. Rushton, the Respondent's president testified he visited the plant at 10 p.m. Sunday, January 4, because:

I had to talk to the watchman to make sure we get the heat on and see that things are as good as we can get them and normal. Certainly you want to have a warm shop. Plus the fact that we have pipes in there that may break if we are not careful.

Foreman Jarvis testified that at "say 8:30" a.m. President Rushton arrived at the plant; that he reported to Rushton that the seven machinists had left in a body due to the cold; that Rushton ordered the discharge of the seven men who had left the plant. Jarvis, however, testified that a meeting of supervision was first held in Plant Manager Raymond Tarrant's office where he was told by Rushton to make the discharges for the reason:

That they had left the premises unauthorized. And this curtailed our operation. And this they were discharged for.

Jarvis further testified that at "around nine o'clock" Affayroux returned to the plant, told him he had only gone for coffee and asked to be returned to work but that he told Affayroux he had already been discharged on President Rushton's orders; that following this conversation [fol. 15] he telephoned to those of the seven men who had telephones and sent telegrams to the others informing them they were discharged.

The discharges according to Foreman Jarvis were all made before any replacements were hired to replace the seven men.¹⁰

Arthur Wamphler, the Respondent's general foreman testified that he took part in the discussion to discharge the seven employees; that the decision was made "between 9 and 9:30 by myself, Mr. Jarvis and Mr. Rushton" and that the men were discharged "for violating plant rules, leaving the plant without permission, and to maintain discipline." However, Wampler admitted that his three assigned reasons were really but one, namely, "leaving the plant without permission."

President *Fred N. Rushton* testified that he arrived at the plant January 5, at 8:20 a.m. and was told by Jarvis that the machinists had "walked off"; that he then told Jarvis "Dave, if they have all gone, we are going to terminate them," that he met with Jarvis and Tarrant, decided what action to take, and that he issued instructions to discharge the men before he left at 9 a.m. Rushton testified:

Q. (By Mr. Bair) What were your own reasons for making the decision to terminate these men?

(The Witness) The real reason is because they didn't inform the foreman of the action they were taking.

The undersigned is persuaded on all the evidence considered as a whole and from his observation of the witnesses that Rushton's testimony that "the real reason is because they didn't inform the foreman of the action they were taking" is merely the statement of an afterthought. [fol. 16] It is clear that the seven men who walked out as a group in protest of their working conditions were engaged in concerted activity protected by the Act,¹¹ the

¹⁰Telegrams dated January 5, 1959, were sent to Olahinsky, Adams, George and Hovis. Telephoned discharges were to Heinlein, Adams and Caron. Affayroux was personally notified.

¹¹ The General Counsel might well have raised a very interesting point of law had the complaint been drawn under Section 502.

fact that they were discharged before they had an opportunity to formally elect a committee to deal with the Respondent with respect to the adjustment of their grievance (as argued by the Respondent) is of no moment.

The men were in reality discharged very soon after 8:20 a.m., Monday, January 5, 1959, by the men who had full authority to do so. *Rushton*, the official who is referred to, testified:

And I came back in the shop. And when I came back in B shop again I noticed all the people were out of the shop.

So Dave Jarvis was there. And I said, "Dave, where is everybody?"

He said, "They have all walked off."

I said, "We can't have that, Dave."

"Well," he said, "they have all gone."

I said, "Dave, if they have all gone, we are going to terminate them."

The complaint alleges and the undersigned agrees that the evidence fully proves that:

On or about January 5, 1959, Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, William George, Jr., and J. Alfred R. Caron, Respondent's employees, did engage in a strike or concerted refusal in the course of their employment to perform any services for Respondent in protest of certain working conditions, to wit, the failure of Respondent to supply adequate heat in their place of employment.

[fol. 17] On the entire record considered as a whole the undersigned finds therefore that the seven men (the Charging Parties herein) on January 5, 1959, by their concerted activity as found herein, became and were economic strikers. The undersigned further finds that by reason of their being discharged *before they were replaced*, they continued to so remain and were therefore unlawfully discharged employees, and as such are entitled to all the rights and privileges of economic strikers.

**CONCLUDING FINDINGS ON
CASE NO. 5-CA-1498**

On all the evidence considered as a whole and from his observation of the witnesses, the undersigned finds that by the discharge of Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr., William George, Jr., and J. Alfred R. Caron as herein found, the Respondent did discriminate and is discriminating in regard to the hire and tenure and terms and conditions of employment of the employees named above, thereby discouraging concerted activity and did thereby engage in and is engaging in unfair labor practices within the meaning of the Act. The undersigned further finds that by such conduct the Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8 (a)(1) of the Act.

**IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES
UPON COMMERCE**

The Respondent's activities, set forth in Section III, above, occurring in connection with the Respondent's operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[fol. 18]

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has discriminated in regard to the hire and tenure of employment of the hereinabove named employees it will be recommended that the Respondent offer them immediate and full re-

instatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and that each be made whole for any loss of pay he may have suffered by reason of the discrimination, by payment to him of a sum of money equal to that which he would normally have earned as wages from the date of the discrimination to the date of the Respondent's offer of reinstatement, less his net earnings during such period.¹² The backpay shall be computed in the manner established by the Board.¹³ The Respondent shall make available to the Board its payroll and other records to facilitate the checking of amounts due.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Respondent, Washington Aluminum Company, Inc., Baltimore, Maryland; is engaged in commerce within the meaning of the Act.

2. By discriminating in the hire and tenure of employment of Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr., William George, Jr., and J. Alfred R. Caron, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of the Act, and by such [fol. 19] discrimination is thereby interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case,

¹² Crossett Lumber Company, 8 NLRB 440.

¹³ F. W. Woolworth Company, 90 NLRB 118.

the undersigned recommends that the Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging concerted activities of its employees by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment;

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a)(3) of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr., William George, Jr., and J. Alfred R. Caron, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority [fol. 20] or other rights and privileges; discharging any employees hired to replace them if this is necessary;

(b) Make whole said employees in the manner set forth in the section of this Report entitled "The Remedy" for any loss of pay they may have suffered by reason of Respondent's discrimination against them;

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due;

(d) Post at its plant in Baltimore, Maryland, copies of the notice attached hereto and marked "Appendix." Copies of said notices to be furnished by the Regional Director of the Fifth Region shall, after being duly signed by the Respondent or its representatives, be posted by

the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not affected, defaced, or covered by any other material;

(e) Notify the Regional Director for the Fifth Region in writing within twenty (20) days from the date of receipt of this Intermediate Report what steps the Respondent has taken to comply herewith.

Case No. 5-RC-2682

The Board on June 30, 1959, having issued an Order Directing Hearing in Case No. 5-RC-2682 upon the issues raised on the eligibility to vote of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux, Sr., and Warren Hovis, and directed that such hearing be consolidated with the hearing in the Complaint issued in Case No. 5-CA-1498 solely with respect to such eligibility and the undersigned having found on all the evidence adduced at the consolidated hearing in Case No. 5-CA-1498 and Case No. [fol. 21] 5-RC-1498 consolidated that the aforesaid Heinlein, Olshinsky, Affayroux, Sr., and Hovis were, among others, employees of the Respondent on January 5, 1959, and have continued to be employees of the Respondent in the status of economic strikers, the undersigned further finds that said striking employees enjoyed the full rights of employees of the Respondent, including the right to vote within an appropriate unit for the determination of a representative for collective bargaining on March 17, 1959.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report, the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

Dated at Washington, D. C., this day of September
1959.

LOUIS PLOST,
Trial Examiner.

APPENDIX TO INTERMEDIATE REPORT**NOTICE TO ALL EMPLOYEES****PURSUANT TO****THE RECOMMENDATIONS OF A TRIAL EXAMINER**

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

We WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities [fol. 22] except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a)(3) of the Act.

We WILL NOT discourage such concerted activity by discriminatorily discharging any of our employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any other term or condition of employment.

We WILL offer to:

ROBERT A. HEINLEIN

FRANK J. ADAMS

FRANK OLSHINSKY

WARREN A. HOVIS

AUGUSTINE APPAYROUX, SR.

WILLIAM GEORGE, JR.

J. ALFRED R. CARON

immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay

suffered as a result of the discrimination, discharging
any persons hired to replace them if necessary.

WASHINGTON ALUMINUM COMPANY, INC.
(Employer)

Dated By
(President)

This notice must remain posted for 60 days from the
date hereof, and must not be altered, defaced, or covered
by any other material.

[fol. 23]

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD.**

TRANSCRIPT OF PROCEEDINGS

(Trial Examiner Plost) The hearing will be in order.

This is a formal hearing before the National Labor Relations Board, in the Matter of Washington Aluminum Company, Inc., and Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, William George, Jr., J. Alfred R. Caron, Case No. G-CA-1498.

The Trial Examiner conducting the hearing is Louis Plost.

APPEARANCES

Will Counsel and other representatives of the parties please put their names into the record. And when you announce your name, please announce your office number.

The General Counsel, please.

(Mr. Wescott) Counsel for the General Counsel, Lawrence S. Wescott and Bernard E. Orem.

(Trial Examiner) And who is appearing for the Respondent.

(Mr. Bernstein) Joseph Bernstein, 1508 First National Bank Building.

(Mr. Bair) Robert R. Bair, 1409 Mercantile Trust Building.

(Mr. Cohen) Leonard E. Cohen, 1508 First National Bank Building.

(Mr. Wescott) It has been stipulated by the parties that the Washington Aluminum Company, Inc., is a company doing interstate commerce—doing business in interstate commerce and during the past 12 months period has shipped in excess of \$50,000 from points inside the State of Maryland to points in the various states of the United States.

J. ALFRED R. CARON

called as a witness and, having been first duly sworn, was examined and testified as follows:

[fol. 24]

DIRECT EXAMINATION

Q. (By Mr. Wescott) Would you state your name and address please? A. My name is J. Alfred R. Caron. I live at 923 Imperial Court, Baltimore 27.

Q. Were you ever employed by Washington Aluminum Company? A. Yes, sir.

Q. What were your dates of employment? A. I went to work for them in March of 1957 until October of 1957. And then I came back in December of 1957 until January of 1959.

Q. And what was your job there, Mr. Caron? A. I was a leader in the machine shop.

(Mr. Wescott) At this time, Gentlemen, I am wondering if we can stipulate that during Mr. Caron's employment he was not a supervisor within the meaning of the Act?

Can that be so stipulated?

(Mr. Bernstein). Yes, it can.

(Trial Examiner) Thank you.

Q. (By Mr. Wescott) Now, Mr. Caron, what did your job involve? What did you do? A. I used to get the men started on the machines, allot the work to them, and make sure they got the hardest jobs out on time, and to help them on the machines.

* * * * *

Q. Now, Mr. Caron, during your employment there as leader, did you ever give the men any time off at all? A. No, sir.

Q. What did the men do when they wanted time off? A. They went to see the foreman Dave Jarvis.

* * * * *

Q. Now, what type of heating did the building have, Mr. Caron? A. We had an oil-fired furnace in "A" shop, and in one corner of the machine shop near the window we had an overhead gas heater.

[fol. 25] Q. On the floor plan, General Counsel's Exhibit 3, the oil-fired furnace or heater that you are referring to, is that marked "Bravo Space Heater"? A. Yes, sir.

Q. And that was approximately behind the foreman's or a little to the right of the foreman's office? A. Yes, sir.

Q. In the machine shop? A. Yes, sir.

Q. The heater that you are referring to in the machine shop, gas heater, is that the one up in the corner over the "M" in the words Machine Shop? A. Yes, sir.

Q. Was that the only heater in the machine shop? A. Yes, sir.

Q. What about down in the next part of "B" shop there, what is that? A. Well the machine shop ended where that aisle goes all the way through the three shops. And they had one hanging on the ceiling also.

Q. Which way was that facing? A. The same way the arrow points.

Q. They were both facing down the shop, is that correct? A. That is right.

Q. Were those two heaters independently operated of the large Bravo Space Heater? A. Yes. One was oil. Those other two are gas-fired.

* * * *

Q. (By Mr. Wescott) During the winter time, what was the general condition of the machine shop? A. When we came in to work in the morning it was always quite cold on cold days.

Q. What do you mean by "quite cold"? A. Well a lot of men worked with their heavy sweaters on or jackets.

Q. I see.

Did you ever make any complaints to anybody concerning that? A. I used to talk to Dave that it was cold and miserable.

[fol. 26] Q. By "Dave" you mean who? A. Dave Jarvis, the foreman.

(Trial Examiner) On what day was this, now?

(The Witness) Not any special day. On cold days.

(Trial Examiner) On cold days. Any cold day?

(The Witness) Yes, sir.

Q. (By Mr. Wescott) Can you think of any specific day that you complained? A. I think we had a cold spell two weeks prior to the day that—prior to that Monday, the 5th. And we were all complaining then that it was cold.

Q. What was the nature of your complaint? A. Well it was cold and miserable and we used to talk and tell them,

you know, how cold it was in there, and they should get more heat for us.

Q. I see.

Did you ever complain to any other company official?

A. No, sir.

• • • •

Q. (By Mr. Wescott) Calling your attention to January 5, 1959, did you report to the plant for work on that date?

A. Yes, sir.

Q. At what time did you arrive? A. Around 7:10.

Q. What was the normal starting time? 7:30.

Q. What was the condition of the plant when you arrived? A. It was very cold.

Q. What did you do when you arrived? A. I went into the office, into the office of the machine shop.

Q. By the office, whose office are you referring to? A. Dave Jarvis's office.

Q. The foreman's office? A. Yes, the foreman.

(Mr. Wescott) Can we stipulate here that Mr. Jarvis is a supervisor within the meaning of the Act?

[fol. 27] (Mr. Bernstein) No. We can stipulate he is a foreman.

• • • •

(Mr. Wescott) We stipulate that Dave Jarvis is a foreman.

• • • •

Q. Will you tell us as best you can remember what conversations took place between you and Mr. Jarvis?

A. Well, normally we sat in the office to get heat, because we had the windows knocked out of the walls so that heat would come in the office. That morning there was no heat in there. Dave and I was talking about how cold it was, and miserable. And a couple of the fellows walked by the window. It was a glass window. And they, they were huddled. He looked up to me and said, "If those fellows had any guts at all, they would go home."

Then we talked a little bit about the coldness. And he left for the offices near the entrance to the plant here, the shop offices.

• • • •

Q. What did you do after Mr. Jarvis left? A. Well, the buzzer sounded for work to begin. And I went out in the shop. And all the fellows were standing around—

Q. Excuse me. By "all the fellows" who do you mean? A. Bill George, Bob Heinlein, Warren Hovis, Frank Olshinsky and Augustine Affayroux.

Q. Did you have any conversation with them? A. Yes, sir. Nobody had moved to do anything yet. They were all huddled there, shaking a little, cold. And I told them, I said "Well, Dave told me if we had any guts, we would go home."

And I said, "I am going home, it is too damned cold to work." And I left.

Q. Did you have any other conversation with these men? A. I asked them what they were going to do. They said—they all started picking up their lunch pails and the thermos bottles. So then I started walking out.

[fol. 28] Q. Did you see Dave Jarvis at the time you started walking out? A. Yes, I met him about half-way, here near the time clock. He was coming back towards the office, towards the machine shop.

Q. Did you have any conversation with him at that time? A. I told him, I said, "Dave, it is too cold, I am going home."

He used to call me Babe. He said, "I will see you tomorrow Babe."

Q. What did you do then? A. I punched out and went home.

Q. Was anybody with you at the time? A. I was alone, sir.

Q. Were any of the other men—where were the other men? A. They were coming out of the machine shop into "A" shop on their way out.

Q. Were you the first man to leave the machine shop? A. Yes, sir.

(Mr. Bernstein) I object. Just a minute. I think it is in order for him to ask him what he said to him; whether he asked him whether he could leave. He is asking for conclusions.

(Trial Examiner) Do it the correct way. Ask him what the conversation was, if there was a conversation.

Q. (By Mr. Wescott) Was that the only conversation that you had with Mr. Jarvis that day that you have related to us? A. Yes, sir.

Q. Now, you say you left and went home; is that correct? A. Yes, sir.

Q. Did you receive any communication from the company that day? A. Yes, sir.

[fol. 29] Q. What type of communication? A. I got a phone call.

Q. Who from? A. From Dave Jarvis.

Q. Approximately what time? A. Approximately 9:30 I would say.

Q. That is a.m.? A. A. M., sir

Q. And will you tell us of the conversation as best you can remember it on the phone? What you said and what he said? A. My wife said, "Somebody is on the phone." I went to the phone. He said, "Hello." I said "Hello." He said, "This is Dave." I said, "Don't say a word, Dave. I know we have all been fired."

He acted surprised as if somebody had called me up already and told me we had been fired. He asked me had somebody told me? I said, "No, I just felt it." He said, "That is the truth," the old man, Mr. Rushton, came through the shop and asked Dave where we all were. He said, we went home because we said it was too cold. And he said, we were all fired.

* * * * *

Q. Did you return to the plant that day? A. Yes, sir.

Q. What happened when you returned to the plant? A. When I came back, Dave was running around trying to—he was trying to see Mr. Rushton or somebody to see if he couldn't get us back to work. And he told me to hang around.

And he said he would see what he could do.

* * * * *

Q. (By Mr. Wescott) Continue, Mr. Caron. A. So then I told him that I had a family to support and I just couldn't afford to hang around. He asked me to hang around for a couple of days, you know, and I would probably get my job back. So we checked out my tool box together. And then I left the plant.

Q. Now, Mr. Caron, going back to when you came out of the shop, or the foreman's office, rather, into the machine shop—

• • • •

[fol. 30] Q. (By Wescott)—did you have a conversation with the men? A. Yes, sir.

Q. Now, would you relate that again, please? A. I came out of the machine shop after the whistle had blown. And all the men were milling around. And usually their boxes are open and they are ready to go to work. This morning they weren't. And I came out, and I was pretty well peeved. I told them, I said, "Dave told me that if we had any guts at all, we would go home." And I said, "I am going home." I said, "What are you fellows going to do?"

Then they started talking among themselves saying, "Well, let's go."

And I started out first. And they were following behind me.

• • • •

CROSS-EXAMINATION

• • • •

Q. Was this particular morning in the plant colder than other Monday mornings in the plant? A. In the winter time, on cold days, it was just cold, you know. I can't say one way or the other. It was just cold.

• • • •

Q. Was it colder than the Monday preceding this particular Monday? A. I don't remember.

• • • •

Q. Would you change your testimony if I told you that General Counsel's Exhibit 2 shows that on this Monday morning the 7:00 o'clock temperature was 16 degrees, with a wind of 13 knots? Would that change your testimony

any? A. No, it wouldn't. I just know it was cold. That is all.

Q. And at 8:00 o'clock the temperature was 15 degrees with a wind of 18 knots. Would that change your testimony? A. In which way? That it was colder?

Q. That this particular Monday was colder than other [fol. 31] Mondays? A. No. All I have to say is that it was cold. I can't say it was colder or not.

• • • •

Q. Now, were the gas space heaters functioning on this particular morning, January 5? A. I can't truthfully say that they were.

Q. You don't know whether or not they were operating? A. I can't say, no. I didn't check to see.

• • • •

Q. Was this furnace operating on this particular morning? A. It was blowing cold air.

Q. It was blowing cold air on this morning? A. Yes, sir.

Q. You would say then that the fan was working but not the burner? A. I don't know. Maybe it was so cold that—I couldn't say that either because I didn't check the furnace. But I know we weren't getting any heat.

Q. You didn't check the furnace? A. No, it wasn't my job.

Q. Did you ask anybody whether the furnace was being attended to? A. No.

• • • •

Q. Did you complain to him that the furnace wasn't working? A. No, I just told him it was cold. I couldn't complain because I didn't know if it was working or not.

• • • •

Q. Yes, Now, you didn't stop to look into the question of how long it would take to get hot air coming out of this furnace rather than cold air, did you? A. No, sir.

Q. You didn't make any inquiry as to whether the furnace was being fixed or not? A. That wasn't my job.

• • • •

Q. Are you familiar with the company rules that ordi-

narily require permission of the foreman to leave the plant? A. Yes. You are supposed to ask for time off.

[fol. 32] Q. (By Mr. Bair) Did you have permission to leave the plant on this day? A. No, sir.

Q. (By Mr. Bair) How many men work in the machine shop for the company? A. We were eight fellows on day shift, including myself, I think it was; and I think we had four or five on night shift on the second shift.

Q. And seven out of the eight fellows left on this particular morning, did they not? A. Yes, sir.

ROBERT A. HEINLEIN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. Did you ever work for Washington Aluminum Company? A. Yes, sir, I did.

Q. When. A. I think it was August of 1953 until January 5, 1959.

Q. Have you ever made any complaint to any supervisor in regard to the heating? A. I have frequently on occasion remarked to Mr. Rushton as he went through the building, and also to Mr. Esender, and I think to Bill Campbell.

Q. Who is Mr. Esender? A. I think at the time he was production manager. And also to Bill Campbell when he was production manager. I always got the answer that if you worked a little bit harder, you wouldn't get cold. That was the answer I got.

Q. Can you remember any specific date or time that you spoke to him? A. No specific time, no, I can't.

Q. What time did you arrive at the plant on January 5, 1959? A. 7:20.

[fol. 33] Q. What was the condition of the plant when you arrived? A. It seemed very cold to me.

• • • •

Q. (By Mr. Orem) What did you do after you changed your clothes? A. I walked out in the shop. As I walked into the machine shop I met Mr. Hovis and Joe Caron standing in the doorway. That wasn't normal because they were usually at their machines. I asked them what was wrong. Joe Caron said, "Well, Dave said that if the men had any guts we would all go home."

I said, "What are you going to do?" He said, "I am going home."

I said, "It is all right with me, I am going home too."

• • • •

I turned and went back in and changed my clothes.

Q. Did you see Mr. Jarvis before you left the building? A. After I changed my clothes I came out of the locker room. I went back to pick my lunch up on the table there, and Dave was walking out from the office towards me. And I said to him, "Dave," I said, "aren't you going with us?" I said, "It is too cold to work." He said, "You know I can't do that."

• • • •

Q. Did anyone give you permission to leave? A. Nobody did give me permission.

Q. Did you receive any communication from the company that day? A. About ten-thirty that same morning Dave Jarvis called me up.

Q. What was the extent of the conversation, sir? A. I answered the phone. He said, "Bob, I have got bad news for you." I said, "What is that?" He said, "Well, the old man said you are supposed to come and pick up your tools and paycheck. You have been fired."

I said, "All right, I will be down in about an hour."

• • • •

[fol. 34]

CROSS-EXAMINATION

Q. (By Mr. Bair) What days did you speak to Mr. Rushton about the cold? A. Well, I couldn't say what day. It may have been two or three times during the six months

before that. Maybe a year before that. Maybe two years. It was always exceptionally cold—it was always cold in the winter time.

Q. Was this in Mr. Rushton's office? A. No. As he was walking through the plant.

Q. By your machine? A. Yes, sir.

Q. How about Mr. Esender? A. Yes. He was out in the shop often.

Q. The same thing two or three times? A. Yes.

Q. How about Mr. Campbell? A. When he was producing manager, I complained to him too.

Q. About— A. About not enough heat, that is right.

• • • •

Q. Did this particular Monday appear to you to be colder than other Mondays in the plant? A. It did to me.

Q. It did? A. It certainly did.

Q. Did you investigate as to any reasons why it was colder? A. I did not, no.

Q. Do you know whether or not the gas heaters in the machine shop were working that morning? A. I couldn't say if they were working or not.

Q. Do you know whether or not the furnace in the "A" shop was operating that morning? A. I could hear it running. I know it was running. Whether or not it was putting out heat I don't know.

Q. You didn't check to see if it was putting out heat? A. It wasn't my job to check the heating system.

• • • •

[fol. 35] Q. Did you ask for permission to go home? A. No, I didn't.

• • • •

Q. (By Mr. Bair) Did you say anything to Mr. Jarvis like "I will see you tomorrow"? A. No, I didn't.

Q. Were you going to come back to work the next day? A. Oh, yes, certainly.

• • • •

Q. Did you realize you had to have the permission of your foreman to leave the shop that morning? A. If we did, we always had to ask the foreman.

Q. If you wanted to take a vacation you asked the foreman, didn't you? A. Yes.

Q. If you were ill and wanted to leave, you would ask the foreman for permission to go? A. Yes.

• • • •
WILLIAM GEORGE, JR.

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
• • • •

Q. Were you ever employed by Washington Aluminum Company, Mr. George? A. Yes, sir.

Q. When were you employed there? A. From January of 1957 to January of 1959.

Q. What was your job with Washington Aluminum? A. Spot weld operator.

Q. And during the winter time, had you made any specific complaints to any particular supervisor?

(The Witness) Yes, sir.

[fol. 36] Q. (By Mr. Wescott) Who did you complain to? A. Mr. Esender and Mr. Jarvis.

Q. Can you recall any specific time that you complained to Mr. Jarvis? A. On several of the cold mornings I asked Mr. Jarvis why the large furnace wouldn't put out more heat?

Q. Now, on January 5, what time did you arrive at the plant? A. Approximately around 7:20; somewhere in there.

Q. What was the condition of the shop when you arrived? A. It was cold.

Q. What did you do when you arrived? A. Well, I came in, punched my time clock, walked over to the spot welder, and walked around it. I noticed an icicle was at the drain pipe. The spot welder is a water-cooled machine. I noticed there was a small icicle at the drain pipe. So I

flicked it off; walked on behind the machine and looked around, and came on out in front of it.

• • • • •

And did you leave with the rest of the men in the shop?

A. Yes, sir.

Q. On that morning? A. I did.

Q. You have heard the testimony that went on here. Was the condition of your leaving substantially the same as the rest of the men? A. Yes, sir.

Q. And were you notified—or how did you find out that you were terminated? A. I came back to work the next morning. I punched in. I walked into the shop. Mr. Jarvis asked me what I was doing. I told him I had come back to work. He said, Well, I am sorry, Mr. Rushton had got mad about us leaving. That was Monday. And he had said to fire us all.

• • • • •

[fol. 37]

CROSS-EXAMINATION

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Q. (By Mr. Bair) Was this Monday morning, January 5, colder than other Monday mornings in the plant, in the machine shop? A. Yes.

• • • • •

Q. (By Mr. Bair) All right. Did you know whether or not the furnace in "A" shop, the big furnace, was operating that Monday morning when you left the plant?

• • • • •

A. No, sir, I did not know.

• • • • •

Q. Now, when you came back the next morning and found that you had been discharged, did you go to anybody and discuss the matter of your discharge? A. No, sir.

Q. Anybody in the company? A. No, sir.

Q. You didn't talk to Mr. Jarvis? A. I asked Dave what had happened. And he said that Mr. Rushton had got mad about us walking out that Monday. So I told him, well—I said, well, can anything be done? He said, no, not

at the present. Mr. Rushton was mad and didn't want to discuss it.

I said, well, if that is his attitude, there is nothing I can do, check me out.

Q. Did you have permission to leave that Monday morning? A. No, sir.

• • • • •
Q. Did you hear the statement made by Mr. Caron that Mr. Jarvis said if you men had any guts, you would go home? Did you hear that statement made? A. On two occasions, yes.

Q. Did you go home because that statement was made?

• • • • •
(Trial Examiner) You can answer the question yes or no. Did you go home because Jarvis had said—had made that statement or did you go home for some other reason?
[fol. 38] (The Witness) I went home for both reasons.

• • • • •
Q. (By Mr. Bair) What was the other reason? A. For it being so cold in the shop.

Q. There were two reasons why you left, then? A. Yes, sir.

• • • • •
(Mr. Bernstein) If Your Honor please, the witnesses we are about to call will be hostile witnesses.

(Trial Examiner) All right. You may call them as hostile witnesses.

FRANK J. ADAMS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

• • • • •
Q. Were you employed by Washington Aluminum Company on January 5, 1959? A. Yes.

Q. This was a very cold Monday morning, was it not, January 5, 1959? A. Yes.

Q. The winds were blowing very fiercely, weren't they?

• • • •
A. Yes, the winds were blowing.

Q. And is this shop an insulated shop?

• • • •
A. No, it is not insulated.

Q. It has a lot of window space in it and plenty of doors to the outside! A. Yes.

Q. These doors are opened in the course of the company's business, aren't they, during the morning? A. Yes.

Q. And was this particular Monday morning a colder [fol. 39] morning than other Monday mornings, inside the machine shop? A. Yes.

• • • •
A. Yes.

Q. Did you notice whether or not the furnace was operating on this particular Monday morning? A. No, I couldn't say whether it was running or whether it was off.

Q. Did you take the trouble to find out whether it was running or whether it was being repaired or anything of that sort? A. No.

• • • •
Q. Now, what exactly did Mr. Caron tell you when you were huddled with this group of men? A. He just came out of the machine shop office there and he said Dave, said, if any of you fellows had any guts you wouldn't work in here today.

Q. Was that the reason you went home? A. Yes.

• • • •
Q. Were there an other reasons why you went home that day? A. Yes.

Q. What were they? A. Well, I was running a fever and I was pretty sick that morning.

Q. And did you later go to the doctor and get a doctor's certificate? A. Yes.

Q. And present that to the company? A. Yes.

Q. (By Mr. Bair) Did you have permission to leave that morning? A. No.

Q. Did you during the course of your employment—were you aware that you had to have permission of a foreman to take time off? A. Oh, yes.

CROSS-EXAMINATION

Q. Did you talk with the rest of the men? A. I talked to Caron and Hovis, Heinlein and Olshinsky.

Q. When did you decide to go home? A. Well, when Caron came out of the office there saying that—saying [fol. 40] what Dave said, that if we had any guts we would go home.

Q. And did you walk out with the rest of men? A. I walked out.

Q. Did you discuss this with the rest of the men? A. Oh, yes.

FRANK A. OLSHINSKY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. Now, were you employed by Washington Aluminum Company on January 5, 1959? A. Right.

Q. Now on this Monday morning, was this an extremely cold Monday morning, and was the wind blowing? A. It was a very cold morning.

Q. And was the interior of the plant colder than other Monday mornings to the best of your recollection? A. It was colder than other mornings, yes.

Q. Did you know whether the furnace was operating on this morning? A. I don't know.

Q. Did you take any trouble to find out? Did you investigate whether it was running? A. No, I didn't.

* * * *

Q. Now, will you confirm what has been said here as to the statement made by Mr. Caron to you as to what Mr. Jarvis said? A. Right.

Q. Did you leave for that reason? A. Two reasons.

Q. What were your two reasons, sir? A. That was one of them. The other one was that it was exceptionally cold in there.

Q. Did you have permission to leave on that morning? A. No, sir.

Q. Did you think you had permission to leave? A. No, sir.

Q. You did not? A. No, sir.

[fol. 41] Q. Did you know that you had to have the permission of the foreman to leave the plant? A. Yes, sir.

Q. Did you testify before the State of Maryland, Department of Employment Security Board in connection with an unemployment compensation claim? A. Yes, sir.

Q. And you testified on April 6, 1959; is that about right? A. Right.

* * * *

Q. Now, did you or did you not testify before this Appeals Referee that the leader of the machine shop told the employees that they could go home because it was too cold to work in the shop? A. No, sir.

Q. Now, did you or did you not testify before the Appeals Referee that you were of the opinion that the leader had authority to permit you to go home? A. That was an opinion that if Mr. Jarvis wasn't there that he could give you permission to go home.

Q. In other words, you thought at that time that if Mr. Jarvis was not there, that Caron had authority to allow you to go home?

* * * *

Q. Didn't you so testify before this Maryland Board that in your opinion Caron had authority to allow you

to go home? A. Well, like I said, that if Mr. Jarvis wasn't there, that I imagine that he would have the authority to let you go home, if you were sick or something like that.

Q. And did you so testify at the Board hearing? A. I believe along that line, yes.

Q. Now, did you think on this particular morning that Caron had authority to allow you to go home? A. Mr. Caron that morning was not given authority. He was only repeating Dave's remarks as to the men having guts to go home. And we just felt that we had enough guts to go home.

Q. Were you taking up a dare ~~man~~ or less, then, or [fol. 42] suggestion? A. It was no ~~dare~~. It was the plain fact that if we would have stayed we would have been damned fools.

• • • •

(Trial Examiner) On the record.

Have you gentlemen arrived at a stipulation that will cover the statements before the Unemployment Compensation Board of the State of Maryland?

• • • •

(Mr. Bair) It is stipulated between the parties that Frank Olshinsky appeared before an Appeals Referee of the Maryland Department of Employment Security on April 6, 1959 and testified that it was customary to take orders from the leader, and that he was of the opinion that the leader had the authority to permit them to go home.

(Trial Examiner) Does the General Counsel join in that stipulation?

(Mr. Wescott) I will so stipulate.

• • • •

AUGUSTINE W. APPATROUX

was called as a witness and, having been first duly sworn, was examined and testified as follows:

• • • •

DIRECT EXAMINATION

• • • •

Q. Now, was this morning of January 5, 1959 a colder Monday morning inside the plant than other Monday mornings? A. To my feeling and knowledge it was, yes.

Q. And was the furnace operating on this particular morning to your knowledge? A. Which one.

Q. The large furnace in "A" shop? A. It was not.
[fol. 43] Q. Did you talk to anybody in management including your foreman as to the steps being made by the company to put this furnace back into operation?

• • • •

A. No.

• • • •

Q. For what reasons did you leave the shop on that morning?

• • • •

(The Witness) The reason I left it was too cold for one thing. And I stopped when the men went out.

Q. (By Mr. Bair) What? A. I went out with the men. I stuck with the men. When they went out I went out.

Q. Did you have permission that morning to leave? A. I did not.

Q. Did you leave as a result of this statement that Caron relayed on to you men? A. That statement came to me two ways. It came to me that it was too cold for him to work. But he had to stay there. And I figured if it was too cold for him, it is too cold for me. I went home.

Q. You left as a result of that statement? A. That is right.

Q. Now, did you testify before the Maryland Department of Employment Security on April 6th of this year?

No, I beg your pardon.

It was February 24 of this year. Did you testify before the Unemployment Compensation Board?

• • • •

Q. Did you testify there? A. Yes, I testified.

Q. And did you state at those hearings the following:

"The leader of the machine shop stated that the foreman had said that it was too cold to work and we would be fools if we did not go home."

[fol. 44] Did you make that statement or did you not? A. I think I put "damned fools" in there. I am most sure I did.

Q. All right. But otherwise you made that statement? A. Yes.

Q. Now, did you testify as follows:

"That as a result of this statement by the leader you left the job along with the other men?"

A. That is right.

Q. Did you also testify that you went to a nearby diner to get some coffee? A. I did.

Q. Did you return to work after going to that diner that morning? A. I came back, yes.

* * * *

Q. Did you know that you needed the permission of the foreman to leave the plant? A. I did.

Q. Did you leave without permission on that morning? A. I did.

* * * *

WARREN H. HOVIS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * *

Q. Now, on Monday morning, January 5th, was this a colder Monday morning inside the plant where you worked than on other Monday mornings? A. It seemed to me like it was extremely cold.

Q. And did you find out why it was cold?

Was the furnace in "A" shop operating at that time? A. Not that I know of. I didn't investigate.

* * * *

Q. (By Mr. Bair) Now, why did you leave the plant on Monday morning with these other men? A. Well, they

[fol. 45] said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way.

(Mr. Bernstein) Just a minute. I move the last part be stricken out "thought there might be some heat brought into the plant that way."

That is his thought.

(Mr. Wescott) He asked for a thought.

(Mr. Bernstein) Let's read the question.

(Trial Examiner) All right. Let's leave it in. Go ahead.

(Mr. Bernstein) Exception.

Q. (By Mr. Bair) Were you aware of the statement that Jarvis had made to Caron which was relayed on to the men? A. I was.

Q. You were aware of that statement? A. Yes. Mr. Caron had told me of the statement.

Q. Did that affect your decision to leave? A. Partly.

* * * *

Q. Did you think that you had permission to leave? A. No.

Q. Did you think that you—that the leader, Caron, could give you permission to leave that morning? A. No.

* * * *

Q. Did you testify before the Maryland Department of Employment Security on February 24, 1959? A. Yes.

Q. In connection with the Unemployment Compensation Claim? A. That is right.

Q. Now, at that hearing before the Department of Employment Security, did you or did you not testify that the leader of the machine shop told you that it was too cold to work and that you were going home? A. That is right. [fol. 46] Q. Did you or did you not testify that you had never questioned the authority of the leader before? A. No, I never had. I still didn't think I had permission.

(Mr. Bair) That is not responsive.

Q. (By Mr. Bair) Did you testify that you had never questioned Caron's authority before? A. No, I never questioned his authority.

Q. You never questioned his authority? A. No.

Q. Now, did you or did you not testify that you assumed that the leader was speaking for the foreman? A. Yes. I thought he was speaking for the foreman.

Q. You did? A. Yes.

Q. So when Caron said that Jarvis said it was too cold, if you had any guts you should go home, you thought Caron was speaking for Jarvis; right? A. Right.

• • • •

Q. (By Mr. Bair) How were you notified of your discharge? A. I received a telegram that evening.

(Trial Examiner) Do you have any of these other hostile witnesses?

(Mr. Bair) No, sir, Your Honor.

(Trial Examiner) Then you are ready to go to your regular case?

(Mr. Bair) Yes, sir.

WILHELM TAFELMAIER

was called as a witness and, having been first duly sworn, was examined and testified as follows:

• • • •

[fol. 47]

DIRECT EXAMINATION

• • • •

Q. By whom were you employed on January 5, 1959? A. Washington Aluminum Company.

• • • •

Q. What was your duty—what were your duties with Washington Aluminum? A. Machinist.

• • • •

Q. About what time did you report to work on January 5? A. I was a little late on this particular morning. About 7:25.

• • • •

Q. And then what happened? A. I go to my tool box. When I went in the door to the machine shop, was the other fellows was standing together. I went to my tool

box and opened it up and turn around. And the other fellows was already going out.

Q. Did you have any conversations with these other fellows? A. No. I just say good morning. That is all. Just across, you know.

Q. Did they speak to you? A. No.

• • • •
Q. Where were you when you saw Dave Jarvis? A. When I returned from my tool box. I go back from my tool box to the office of Dave Jarvis and say well, it is really cold this morning. And then the other fellows was already gone.

Then I go back in the wash room and put my overcoat on and go back on the machine again.

• • • •
(Trial Examiner) You testified that you went back and got your overcoat and put it on?

(The Witness) Right.

[fol. 48] (Trial Examiner) Why did you do that?

• • • •
(The Witness) Because it was really cold.

(Trial Examiner) And did you continue to work in your overcoat?

(The Witness) Yes.

(Trial Examiner) The rest of the day in the plant?

(The Witness) Well, I figured it get warmer after a while. So I take my overcoat for a beginning.

(Trial Examiner) When did you take your coat off?

(The Witness) Oh, this was about ten-thirty.

(Trial Examiner) Did you put it back on in the shop after 10:30?

(The Witness) No. I don't need it anymore.

• • •
Q. You just went back to work? A. Yes.

Q. And you say that the plant was getting warmer by ten or 10:30, and you took your overcoat off? A. Yes, I took my overcoat off about 10:30.

Q. Do you know whether the large furnace in the A

shop was not operating when you first entered the job that morning?

A. I don't know. But I think not. Because it was too cold in there.

CROSS-EXAMINATION

Q. (By Mr. Wescott) Did you ever complain to Mr. Jarvis about the heat in the plant? A. No.

[fol. 49] How many times during that winter in the shop did you work with your overcoat on?

(The Witness) Just on this particular morning.

Q. (By Mr. Wescott) On January 5, 1959, did Mr. Heinlein, as he was leaving the shop, ask you to go with them? A. No.

Q. (By Mr. Bair) Was this Monday morning a very cold morning? A. Yes.

Q. It was one of the coldest of the winter? A. Yes.

(Mr. Wescott) I will stipulate to that.

(Mr. Bair) All right.

Q. (By Mr. Bair) You wore your overcoat only on this one morning? A. On this morning and this morning only, yes.

VINCENT BATTAGLIA

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. Were you employed by Washington Aluminum Company on January 5, 1959? A. Yes, sir.

Q. In what position? A. Watchman.

• • • • •
Q. Now, when did you go to work on Sunday, January 4? A. Four o'clock Sunday evening.

Q. And how long did you work on that particular occasion; until what time? A. Four o'clock Sunday evening until Monday morning.

[fol. 50] Q. At what time? A. 7:30.

• • • • •
Q. Now what are your instructions as to turning on the furnaces of the company in the morning? A. In the morning, I go to work five o'clock in the morning regular time. If it is cold during the night, I got orders to turn the heat for couple of hours, and then turn it off again, if it is really cold night. Five o'clock in the morning I put the heat on.

Q. On this particular Monday morning, did you turn on any of the heaters ahead of time? A. Yes, I did. One o'clock Monday morning.

Q. What heaters did you turn on? A. I turned all the heat on for about an hour and a half.

Q. For about an hour and a half? A. Yes, then turned it off.

Q. Then turned it on again? A. Then turned them on again five o'clock Monday morning.

Q. Did you have any trouble with any of the heaters or any of the furnaces on this Monday morning? A. Yes, one.

Q. Which one? A. The big furnace in A shop.

Q. The large furnace in the "A" shop? A. Yes.

Q. Did you try to turn on the large furnace at one o'clock in the morning? A. That is right. I try. But it didn't work.

Q. It did not work? A. No, sir.

Q. Did you try again at 5:00 o'clock? A. I tried again, yes.

Q. Did it work then? A. No, sir.

Q. What did you do when you found that you could not

start the furnace? A. Well, I wait until the time people coming in to work.

[fol. 51] Q. Waited until what time, sir? A. Seven o'clock. I stay right to the time the people started coming in. As soon as Mr. Roy come in, the electrician, I reported to him that the big furnace is out of order.

• • • •

Q. Then what did you do after you reported the furnace to him? A. As soon as Mr. Roy come in, I told him the furnace is out of order. He come in and put his lunch right on top of little table over where they got a box. And he went to see the furnace. He tried, but it didn't work. Then he pulled something out. That is where the motor is.

Q. What time? A. It was about quarter after seven when he come in.

• • • •

(The Witness) Twenty-five minutes after seven I punched my card and went home.

(Trial Examiner) It still wasn't working?

(The Witness) No. I don't know when it started to work.

• • • •

DAVID N. JARVIS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

• • • •

Q. (By Mr. Bair) By whom are you employed at present? A. Hanover Tool and Die Company.

• • • •

Q. By whom were you employed prior to that? A. Washington Aluminum Company.

• • • •

Q. Now, what units serve to heat the machine shop area? A. Well, primarily the big furnace in "A" building, which is right around the corner from the machine

[fol. 52] shop. There are ducts on top of the furnace which are directional. You can aim these things in one direction or another. We attempted to keep one of them aimed—well, one aimed through one door into the machine shop, which was my office, and the other one down to the other end, which more or less made the air go down into the lower end of "B" shop.

• • • • •
Q. Did you also have gas space heaters? A. Yes, we did.

Q. To heat the machine shop? A. Yes.

Q. How many of those? A. Well in the immediate area there were two. There was one that was mentioned down at the lower end of the machine shop, down in the corner, which was directed over the lathe group. Then there was another on the aisle which was directed toward the lower end of the shop where the dip tanks were located.

Q. Did the nature of your business require the doors to the outside from the machine shop area be opened? A. Yes, it did, quite frequently.

Q. For what purposes? A. It was necessary to operate the doors to bring in raw materials and to take out finished products. And I think it is reasonable that the majority of the time the doors were opened was to bring in raw materials.

• • • • •
Q. Now, you have heard some testimony on direct that a number of these men here made complaints to you about the cold. Which of these men made complaints and what was the nature of the complaints, if any? A. Well, I can recall complaints not in a formal sense. It was, I think—I think the complaints were in the line of general griping that you have in the lot. It is either too cold or too hot or something of that sort. Specifically Ronnie and I have talked about it.

Q. Ronnie who? A. Mr. Caron. We talked about the cold or the heat. I can remember Bob Heinlein mentioning the fact that it was too cold.

[fol. 53] Q. Can you pinpoint these--you called it general griping--can you pinpoint that down to a specific number or specific times? A. No, sir.

Q. Did they ever ask you to do something of a specific nature about the cold? A. Not in a formal sense of requesting to go to management or something of that nature. I always accepted these things as the sort of griping that is done in a shop.

• • • •
Q. Did they ever ask you to go to somebody higher up in management? A. No, sir.

• • • •
Q. Now, turning to Monday morning, January 5th, how would you describe the weather conditions on that day? A. It was extremely cold.

Q. Was the wind blowing? A. Yes, it was.

Q. Was it colder on this particular Monday inside the machine shop than on other Mondays? A. Yes, it was.

Q. Do you have an explanation for this? A. Yes. When I arrived there, the main furnace in "A" building was not functioning.

Q. And what did you proceed to do about that? A. I spoke to the watchman. And when Roy Rose came in, why, we immediately got him working on the furnace.

Q. What time was this? A. A quarter after or twenty after, something like that.

Q. Then what did you do? A. Well, at that time I went over to the machine shop and looked around at the work that was in progress. In other words, I followed up on what the previous night shift had done. And then Ronnie and I had this conversation in my office.

Q. By Ronnie, who do you mean? A. Mr. Caron.

Q. Would you repeat that conversation for the record? A. Well, the construction of the thing was it was pretty [fol. 54] cold in there that morning. And I did make the statement that has been said.

• • • •
(Trial Examiner) What was the statement that you made?

(The Witness) Well, it has been brought up as to whether I said we or they. Frankly I don't recall. I said something about either we or they had any guts, they would go home. I don't know whether it was personal or plural. But I have to qualify this in the sense that it was partly Mr. Caron and my relationship. I don't know how to suitably put that into words.

Q. (By Mr. Bair) Well, do the best you can! A. Well, we—I tried to be most frank with Mr. Caron on everything that we did. I tried to have here a man that if need be could replace me in the shop, or was fully aware of what was going on. We also worked together, as I said before; and, therefore, I was under the impression that things of this nature that we had said and had been said prior to this at various times, such as if we had a bad job, why, I think—I think one specific job, I remember, we had a landing gear we were working on. Something went wrong with it. And remarks were made to the sense that "grab your tool box and let's go, this job is all fouled up." Something of that nature. This was more or less our relationship. I don't know how I can dress that up any more, or make it any clearer.

Q. Now, turning to the extent of your authority, did you have authority to send these seven men home on this particular morning if they had requested permission? A. No, sir.

* * * *

Q. (By Mr. Bair) You said if seven men went home it would close down the machine shop? A. It practically did, yes, sir.

* * * *

[fol. 55] Q. Now, would you have the authority to let seven men leave the plant to get a cup of coffee if he were extremely cold in the morning? A. Well that is a moot point. We had a coffee machine right in the shop. And the men could get coffee from this at any time that they so desired.

* * * *

After making these statements to Mr. Caron on this particular morning, what did you do next? A. Well, we

had one item there that had to be shipped out immediately that day. And the night shift prior to that Friday night had finished the job up. So I took it over to the shipping department with the shipping papers so that we could get this thing on the road as soon as the drivers came in.

• • • • •

Q. What time did you get back to your office, Mr. Jarvis? A. It was a few minutes after the whistle had blown. I am not quite positive as to the exact minute now. But I am sure the whistle had blown. It was past 7:30.

Q. And what took place when you got there? A. As I got back to my office, Bill George and the men were on their way out the door and they hollered to me. Bill said, "We are going home. Do you want to come with us?"

My first thought on the thing was that they were kidding.

Q. That what? A. That they were kidding.

Tafelmair came walking by, and he was sort of hesitant, or he looked puzzled. And I said to him, I said, "Where are you going?" He said, "Well, I think they are going home. I guess I will go too."

I said, "Well, now, just hold on a minute." So then I talked to Tafelmair. And, of course by this time this group of people had gone out the door.

Q. What did you tell Tafelmair to do? A. I told Tafelmair that this wasn't the thing to do; that we would have to make some arrangements. Consequently, he stayed with me.

[fol. 56] Q. Did you put him back to work? A. Yes, I did. Now, he mentioned yesterday that he got his over-coat. I would like to say that when he and I were talking, he told me it was cold. I said, well, do you have another coat? He said, yes. I said, well, why don't you get it and put it on.

• • • • •

Q. Now, how far were these men from you when George called to you? A. In terms of feet, that is hard for me to say.

Q. Well, what was their location and what was yours at the time this took place? A. I was standing by the door

to my office, or on that corner of the office there. And these fellows were going out through "A" shop.

Now, just in terms of feet, it surprised me so badly frankly, I would hate to even hazard a guess.

Q. Well, how near were they to the time clock? A. Well, I will say half way. I am not—that is just an estimate.

• • • •

Q. (By Mr. Bair) When these men were leaving the plant, did any of them ask you what the company was doing about the cold? A. No.

Q. Did any of them ask what the company intended to do about the cold? A. No.

Q. Did they ask you whether something was wrong with the heating system of the company? A. No. The only thing that was said to me was an invitation from Bill George to come along with them.

Q. That was the only thing you remember passing between you and the men as they left? A. Yes.

• • • •

(The Witness) Just as to the exact sequence of how this occurred I am not sure. However, I will say that I talked to Art Wampler. I had a man by the name of Zakaas who had off and on worked in the machine shop; I had him brought over so I could put him to work. We [fol. 57] had a man up in "D" shop across the road, a man named Mike Kissell who ran a Bridgeport Mill for us; I brought Mike over to run a milling machine.

In the course of events we talked to Art Wampler, and then Mr. Rushton. And—

(Trial Examiner) Who is this last man?

(The Witness) Mr. Rushton is the President of the Company.

(Trial Examiner) Thank you.

Q. (By Mr. Bair) And then what was the result of these talks? A. Well, Mr. Rushton's decision on the matter was that these people left unwarranted and that they should be discharged.

• • • •

Q. Did any of these men return to the company that morning? A. Yes, Mr. Affayroux came back in, I will say, around nine o'clock.

Q. What did he say? A. He told me he had been over to the drive-in diner over on Southwestern Boulevard; that he got gotten a cup of coffee; and that he hadn't intended to go home, that he went over to get warm and to come back.

Q. Did he know at this time that he had been fired? A. I informed him of Mr. Rushton's decision, yes.

• • • •

(Trial Examiner) Sustained.

Now, you say that Mr. Rushton made the decision to discharge these 7 men; is that correct?

(The Witness) Yes.

• • • •

(Trial Examiner) What did he say at the time?

(The Witness) I don't remember the exact wording. But he said to the effect that these people left the premises unauthorized, and I want them discharged.

[fol. 58] (Trial Examiner) What reason did he give for discharging them?

(The Witness) That they had left the premises unauthorized. And this curtailed our operation. And this they were discharged for.

• • • •

Q. (By Mr. Bair) What steps did you take to discharge the men? A. Well, I told them that they were discharged.

Q. How? A. Well, I called the ones that had phones and sent telegrams to the others.

(Trial Examiner) Except this one man who told you that he had gone out for coffee and he came back in?

(The Witness) Yes, sir.

• • • •

Q. (By Mr. Bair) Did you have any later talks with Mr. George? A. I talked to Mr. George on the phone, I believe, first.

It is difficult to recall just when. At any rate when I called George, or he called me—I am not positive just how that went—but he informed me then when I was talking to him that he knew that he was wrong. He was the only one of the group that did admit that.

• • • • •

Q. Did you have any later talks with Mr. Adams? A. Yes. Mr. Adams came in with a Doctor's certificate.

Q. When was that? A. The following day, I believe.

• • • • •

Q. What happened to your machine shop operation on this morning when these seven men left? A. Well, that curtailed the operation completely for the moment with the exception of one man.

Q. Is it fair to say it shut down your shop? A. I think so, yes.

[fol. 59] Q. Was it comfortable enough to work that morning? A. No. Actually it was a bit uncomfortable until I would say ten o'clock or somewhere around that time.

• • • • •

Q. (By Mr. Bair) What time did the furnace start operation that morning? Remember the furnace in "A" shop that you had said was not operating, what time was it put in operation? A. About quarter to 8. About 7:45 I think is a fair guess on that.

• • • • •

(Trial Examiner) On the fifth of January that this happened, what time of day was it that these two men and the man that you kept—you only had three men in there that day—worked at the various machinery without coats or various other clothing bundling them up? What time of day was it that they did that?

(The Witness) That is hard to say, sir. I would have to say that was probably after lunch time.

(Trial Examiner) But until lunch time they had to stand there at their machines working in some sort of excess amount of clothing!

(The Witness) Well, the nature of our business, sir, was such that we have the shop coats—there are coats for this purpose, and this is a common practice in that plant to wear a coat of that sort.

(Trial Examiner) What kind of a coat?

(The Witness) A shop coat. They are denim. They make them a little neer for you nowadays.

• • • •
Q. (By Mr. Bair) Did any of the men going home ask you for permission? A. No.

Q. When these men returned to the plant, did any of them ask you to be reemployed? A. Yes.

Q. Which men? A. Mr. Affayroux for one. I don't know as it was put as a direct statement or request. That [fol. 60] was the terminology. You know what I mean. It was inferred that he would like to go back to work.

Q. Which of these men asked you? A. Well that is difficult.

Of Mr. Affayroux, I am quite sure.

Mr. George mentioned this.

To the best of my knowledge that is about the extent of it.

Q. Now, was this the same day or the next day or when? A. Well, in Mr. Affayroux's case, it was the same day. And in Mr. George's case, it was—let me see—it was several days later when he called me the second time.

Q. Now, when Mr. Adams brought you a Doctor's certificate, did he present this as an excuse? A. Yes, he did.

Q. He wanted to go back to work too, didn't he? A. Yes.

Q. And when was that? A. I believe that was the next day, the sixth.

Q. Did Mr. Adams say anything about being sick before he left on Monday? A. No, sir.

• • • •
CROSS-EXAMINATION

Q. So that you don't remember who was going out? A. I remember specifically talking to Mr. Caron. I recall

Mr. George hollering to me, do you want to come along. So the other people, I have no explanation of it other than the fact that I just was flabbergasted or what have you; and I had to check the cards to make certain.

• • • •

Q. Now, you knew why they were leaving, didn't you?
A. Not at first. When I talked to Tafelmair, I was made aware of it.

[fol. 61] Q. Which was right at the time they were leaving? A. Well, they were gone by the time I got the drift of what was going on.

Q. But you knew why they left when you talked to Mr. Rushton for sure? You knew that? A. Yes.

• • • •

Q. (By Mr. Wescott) What was your reply to the man who said "come on, aren't you going with us?" A. I don't believe I made a reply to that.

Q. You didn't say anything? A. No. My first thought was that was a put-up joke or something of that nature.

• • • •

(The Witness) It just didn't occur to me these fellows were going home and leave me high and dry there. I don't know if that is hard to understand, but I just could not understand it at the moment.

• • • •

Q. All right. Now, when you made these phone calls to the men to inform them of their discharge, had you hired—had there been any new men hired to replace these men? A. No.

• • • •

Q. Now, if a man is to be discharged or disciplined, would you have the right to recommend his firing or his discipline, or to discharge him? A. Yes.

Q. And would you also have the right to hire a man? A. Yes.

• • • •

RAYMOND G. TARRANT

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

[fol. 62]

DIRECT EXAMINATION

• • • •

Q. What is your present position with the company?
A. Plant manager.

• • • •

Q. (By Mr. Bair) Now, Mr. Tarrant, did any of these 7 men who left the plant on January 5 make any formal complaints to you about the cold working conditions in the plant? A. No, sir.

Q. Did any of the men gripe to you about the cold in an informal way? A. Yes. We have had discussions relative to the weather, whether it was hot or cold or wet.

Q. Were any of these gripes of a specific nature? A. No, sir.

Q. Now, which of these men made these gripes to you? A. I would say that I have talked to all of them at one time or another, as I passed through the plant.

Q. Over how many years? A. As many as I have been employed there.

• • • •

(Trial Examiner) When you talked to George and he told you that he wanted to go back, what did you tell him?

• • • •

(The Witness) I told him that the decision had been made to discharge the employees. And in view of the fact that we couldn't tolerate having people just walk out of the plant at any time that I didn't think we could take him back.

• • • •

ARTHUR WAMPLER

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

[fol. 63]

DIRECT EXAMINATION

Q. What is your present position? A. General foreman.

Q. And how long have you had that position? A. November 1958.

Q. Now, did any of these seven men prior to January 5, 1959 ever lodge a formal complaint with you about cold working conditions in the machine shop? A. No, not at all.

Q. Did any of them gripe generally to you about the cold? A. In normal conversation.

Q. What kind of conversation? A. Well, being associated with the men from time to time while I, myself, was in the shop, I would talk to them on various problems, various topics of any current nature.

Q. Would they also complain about the heat in the summer time? A. Oh, yes.

Q. Who is Mr. Esender? A. He at one time was production manager. He is the equivalent to the general foreman, the titles being different.

Q. What was his position with the company during the winter of 1958-1959? A. He was the production coordinator.

Q. What were his duties? A. More or less to channel the work through into the shop from engineering, contracts, to myself, in the form of a work order.

Q. Was he in the chain of command, so to speak, between these men and you and the top of the company? A. Not at that time, no sir.

Q. Who is Mr. Campbell? A. Mr. Campbell was a previous general foreman or production manager.

Q. Was he with the company during the winter of 1958-1959? A. Yes.

[fol. 64] Q. What was his position with the company then? A. He was in the estimating department.

Q. And where are their offices located? A. In the engineering building across the street.

Q. How far away is that from the machine shop? A. That is in another building, approximately 200 to 300 feet away.

Q. (By Mr. Bair) What are the instructions to the watchman of the company as to turning on heating units on the mornings of the working days? A. Turning on in the mornings probably at five o'clock, exactly five o'clock, or thereabouts.

Q. Now, were the heating units ever turned on before five o'clock in the morning?

(The Witness) Yes. Part of the watchman's instructions were at any time on the week-ends or nights when the temperature becomes severe to turn on all the heaters at regular intervals to protect and maintain above-freezing condition in the buildings.

Q. (By Mr. Bair) What time did you arrive at the plant on the morning of January 5? A. Between 7:45 and 8:00 o'clock.

Q. What did you first do? A. I entered the shop office.

Q. What happened then? A. Almost immediately Mr. Jarvis entered and told me that the men in the machine shop had left their jobs, with one exception.

Q. Continue! A. The first step that I took was to find out why, and I was informed that it was too cold. I realized we had critical jobs in the machine shop. And I took steps to supply Mr. Jarvis with men to carry these jobs on.

[fol. 65] Q. And who were these men? A. A man by the name of Kissel, and a man by the name of Zakas.

Q. Was your machine shop operation curtailed by this walkout? A. Very much so.

Q. In what way? A. The fact that had to stop the jobs that they were normally working on. The men that we replaced them with moved into the machine shop, and their jobs were stopped.

Q. (By Mr. Bair) Did you take part in the decision to fire the 7 men? A. Yes.

Q. What time was that decision made approximately? A. Between 9 and 9:30, as near as I can recall.

Q. By whom? A. By myself, Mr. Jarvis and Mr. Rushton.

Q. And did you discuss the reasons behind your decision? A. Yes.

Q. Why did you fire these men? A. For violating plant rules, leaving the plant without permission, and to maintain discipline.

(Trial Examiner) Wait a minute.

Violating plant rules and leaving the plant without permission is the same thing, isn't it?

(The Witness) Well they left without the foreman's permission.

(Trial Examiner) All right. They left without permission. And they violated the plant rule when they left without permission, didn't they? It is the same thing, isn't it?

(The Witness) Yes, I would say so.

(Trial Examiner) And to maintain discipline, you didn't fire them for that?

(The Witness) No, not for that reason.

[fol. 66] (Trial Examiner) Then you fired them because they left the plant?

(The Witness) Correct.

(Trial Examiner) Without permission?

(The Witness) Correct.

* * * *

Q. (By Mr. Bair) Were there any other reasons why you fired these men? A. No other reasons, no.

* * * *

Roy V. Rose

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * *

Q. And were you maintenance man in January of 1959?
A. Yes, sir.

Q. When did you arrive at the plant on the morning of January 5, 1959? A. Well, to be definite I can't say to a minute. But to my normal arrival time, it was somewhere between 7 o'clock to 7:15 in the morning every day. So I would say that day was like all others.

Q. Was anything wrong with the main furnace when you got to the plant that morning? A. Yes, sir.

Q. What was wrong with it? A. Well there was a switch on the back of the furnace that switches the furnace from manual operation to automatic operation. This switch had been placed in the manual position.

When this switch is in the manual position, the fan on the furnace will run. The electrodes will not operate, or the furnace will not burn.

[fol. 67] Q. (By Mr. Bair) It was blowing cold air at the time, wasn't it? A. Yes, sir.

Q. (By Mr. Bair) Did you fix it and how long did it take you? A. Yes, sir I did fix it. And I would say something like 15 or maybe 20 minutes.

Q. And what time of the day was it fixed and operating? A. I think that it was operating before the bell rang. But I wouldn't be positive. It might have been a minute or two later.

Q. After 7:30 in the morning? A. Yes, sir.

(Trial Examiner) After that heater gets to running, that furnace, how long does it take it to be running full capacity?

(The Witness) It will take it, I will say, five to eight minutes to have its full capacity of heating at the furnace.

(Trial Examiner) At the furnace?

(The Witness) Yes.

(Trial Examiner) And how long will it be before it is throwing any heat any appreciable distance away from the furnace, say, 50 feet from that furnace?

(The Witness) Well something from 10 to 15 minutes.

• • • •

(Trial Examiner) Do you mean to say that furnace would heat up in that plant within 15 or 20 minutes?

(The Witness) No, sir.

• • • •

(The Witness) And you can feel the heat coming out from the ducts at the top of the furnace for 40 to 50 feet within 10 to 15 minutes. As far as having it actually having warm 40 to 50 feet within 15 or 15 minutes, it will not do that.

[fol. 68] (Trial Examiner) How long did it take on that January 5th, before it got the building warm within 50 feet of the furnace?

(The Witness) I would say from 2½ to 3½ hours.

• • • •

FRED N. RUSHTON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

• • • •

Q. What is your position? A. President.

• • • •

Q. I show you General Counsel's Exhibit No. 3 and ask you to refer to the heating units that heat A shop and B shop. And I ask you whether since 1952 those units were in and furnishing heat at that time? A. In 1952 we have added adjacent to the B shop we have put in 185,000 Btu heater, and in the north end of A shop we have installed half a million Btu heater since that time.

Q. When did you install the half million Btu heater in "A" shop? A. The latter part of November in 1958.

Q. Now, have you ever received any formal complaints from the seven men that it was too cold to work in the machine shop? A. Well, I have been out of the shop for 2½ or 3 years. Prior to that I have had some gripes.

Q. What was the nature of them and how many? A. Well just as such "It is cold today." No more than we have talked about the heat the last week, it has been pretty unbearable.

• • • •

Q. (By Mr. Bair) Do you have any written company rules relating to leaves of absence and leaving the plant with or without permission during working hours? A. We have an unwritten rule. You certainly can not permit [fol. 69] a thing of this nature happening when it—whether it involved one man or a dozen men. You have got absolute chaotic condition.

Q. (By Mr. Bair) Now, did you visit the plant during the week-end of January 3 to January 5, 1959? A. Yes, I did. I visited there probably about ten o'clock the night of the 4th, which was a Sunday night. It was quite cold.

• • • •

Q. Now, when did you arrive at the plant on Monday, January 5? A. Well, this morning I arrived there approximately 20 past 8. I immediately proceeded to the plant, which I don't normally do. Because of the cold weather I wanted to see that everything was carried out the way we discussed the night before. I walked through all the shops. I noticed that the machine shop was empty. I didn't think anything about it. I thought maybe they had gone and got a cup of coffee, or maybe went to get warned up.

So I proceeded to walk through the balance of the shops and out to the paint shop and around the yard where there were some men working. And I came back in the shop. And when I came back in B shop again I noticed all the people were out of the shop.

So Dave Jarvis was there. And I said, "Dave, where is everybody?"

He said, "They have all walked off."

I said, "We can't have that, Dave."

"Well", he said "they have all gone."

I said, "Dave, if they have all gone, we are going to terminate them."

So, I said, "Well, before you do that now, I want a list of these people, whoever they are." And I said, "I will see you over in Mr. Tarrant's office."

So we got over in Mr. Tarrant's office, and I asked for Mr. Wampler to come in. He was involved. I asked him [fol. 70] what he knew about the situation. We discussed it at great length. I did personally, because when he gave me the names of the people, they were all good men. They have worked for us; they have helped us to build this company. And we discussed the pros and cons of the damages that it might do to us by stopping productivity. We discussed the disciplinary action that should be taken.

Like I say, a thing like that, it could bring a chaotic condition throughout the plant, if we permitted anything like that.

(Mr. Wescott) I move that be stricken.

(Trial Examiner) It may be stricken beginning with the description of what they talked—what you and your other officials talked about.

Q. (By Mr. Bair) What were your own reasons for making the decision to terminate these men?

* * * *

(The Witness) Well, the real reason of course is that I was very upset at the foreman for not getting the information from those felows, not getting the—

(Trial Examiner) Is that the reason you discharged the men, because the foreman didn't get the information?

(The Witness) The real reason is because they didn't inform the foreman of the action they were taking.

(Trial Examiner) Is that the reason you discharged them?

(The Witness) That, plus the disciplinary action.

(Trial Examiner) All right. Thank you.

Q. (By Mr. Bair) Did you find out from the foreman whether they had asked permission to leave the plant? A. Yes. After we had the meeting in the office.

Q. What did the foreman say? A. He said he hadn't had an opportunity to talk to them; they had just walked off. And there is where I got pretty hot at him for not—
[fol. 71] Q. If the men walked off without the foreman's

permission, would that be a violation of the company's rules? A. It certainly would.

Q. (By Mr. Bair) About what time was this decision made to terminate the men?

A. I beg your pardon. Nine o'clock.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 1-F
ORDER DIRECTING HEARING

On March 17, 1959, pursuant to a "Stipulation for Certificate Upon Consent Election" entered into by the parties hereto, an election by secret ballot was conducted in the above-entitled proceeding under the direction and supervision of the Regional Director for the Fifth Region (Baltimore, Maryland). Upon the conclusion of the election a Tally of Ballots was furnished the parties in accordance with the Rules and Regulations of the Board.

The Tally of Ballots shows that there were approximately 144 eligible voters and that 144 ballots were cast, of which 68 were for the Petitioner, 70 were against the Petitioner, 5 were challenged and 1 was void. At the count of the ballots, the Board Agent ruled that one ballot was void and that another was a "No" vote, while the Petitioner argued that the ballot which was ruled void should have been counted as a "Yes" vote, and that the ballot counted as a "No" vote should have been considered void. Accordingly, the Petitioner wired its objections to the rulings on March 30, 1959. The Regional Director considered the status of these 2 ballots and, inasmuch as the challenges were sufficient in number to affect the results of the election, investigated the challenges, and.

thereatfer, on June 11, 1959, issued and served upon the parties his Report on Challenges.

In his report the Regional Director stated that he is of the opinion that the ballot ruled as void was intended to [fol. 72] be a "Yes" and he, therefore, recommended to the Board that the ballot be found to be valid and counted as a "Yes" vote. As to the ballot ruled as a "No" vote, the Regional Director stated that he is of the opinion that the intent of the voter was to cast a "No" vote and he, therefore, recommended that the ruling of the Board Agent on this ballot be sustained. With respect to the challenged ballots, the Regional Director recommended that the challenge to the ballot of Donald Dicus be overruled and that the ballot be opened and counted at an appropriate time. The remaining four challenged ballots belong to individuals named as discriminates in a complaint issued by the Regional Director on May 15, 1959, in Case No. 5-CA-1498. The Regional Director found that the eligibility of these four voters depends upon the resolution of the unfair labor practice case and he, therefore, recommended to the Board that it order a consolidation of the instant case with Case No. 5-CA-1498 solely as to the eligibility to vote of Robert A. Heinlein, Frank Olshinsky, Augustine Affrayroux and Warren A. Hovis.

Inasmuch as no exceptions were filed to the Regional Director's report by any of the parties within the time provided therefor, the Board decided to adopt the Regional Director's recommendations as contained in his report. Accordingly,

It Is HEREBY ORDERED that the ballot ruled as void by the Board Agent be, and it hereby is, found to be valid, and that it be counted as a "Yes" vote, and that the ruling of the Board Agent as to the ballot ruled as a "No" vote be, and it hereby is, sustained; and

It Is FURTHER ORDERED that the challenge to the ballot of Donald Dicus be, and it hereby is, overruled and that it be opened and counted at an appropriate time; and

It Is FURTHER ORDERED that a hearing be held before a Trial Examiner, to be designated by the Chief Trial Examiner, to resolve the issue raised on the eligibility to vote

of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux and Warren A. Hovis, and that such hearing may be [fol. 73] consolidated with the hearing in the complaint issued in Case No. 5-CA-1498, solely with respect to such eligibility; and

IT IS FURTHER ORDERED that the Trial Examiner designated for the purpose of conducting the hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the said issues. Within the time provided for in the Board's Rules and Regulations, any party may file with the Board in Washington, D. C., an original and six copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Trial Examiner; and

IT IS FURTHER ORDERED that the above-entitled proceeding be, and it hereby is, referred to the Regional Director for the Fifth Region for the purpose of arranging such hearing, and the said Regional Director be, and he hereby is, authorized to issue early notice thereof.

Dated, Washington, D. C., June 30, 1959.

By direction of the Board:

GEORGE A. LEET,
Acting Associate Executive Secretary

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DECISION AND ORDER**

Upon charges duly filed by Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO (herein called the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for the Fifth Region, issued a complaint dated May 5, 1960, against Washington Aluminum Company, Inc. (herein [fol. 74] called the Respondent), alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5) and Sections 2 (6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent and the Charging Party, herein called the Union.

With respect to the unfair labor practices, the complaint alleges, in substance, that the Union was and is the exclusive representative of all production and maintenance employees of the Respondent in an appropriate unit, and that on April 21, 1960, and at all times thereafter, Respondent unlawfully refused to bargain collectively with the Union.

Respondent's Answer, filed May 9, 1960, admits certain jurisdictional and factual allegations of the complaint, but denies the commission of unfair labor practices.

On June 9, 1960, all parties to the proceeding entered into a stipulation of facts, and on the same date jointly agreed to transfer this proceeding directly to the Board for finding of fact, conclusions of law and decision and order. The stipulation states that the parties have waived their rights to a hearing before a Trial Examiner, and to the issuance of an Intermediate Report. The stipulation provides in substance that the entire record in this case shall consist of the formal pleadings herein together with the entire record in Case No. 5-RC-2682, the Board's Decision, Direction and Order in the consolidated Cases Nos. 5-CA-1498 and 5-RC-2682,¹ and copies of 3 letters

¹ Washington Aluminum Company, Inc., 126 NLRB No. 162.

representing correspondence between the Respondent and the Union following the latter's certification by the Board.

On June 14, 1960, the Board granted the parties' motion to transfer the case to the Board. Upon the basis of the parties' stipulation and the entire record in the case, the Board² makes the following:

[fol. 75]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Delaware corporation, is engaged in the fabrication of aluminum products at its Baltimore, Maryland, plant. During a one year period, being representative of its operations at all times material herein, Respondent shipped products valued in excess of \$50,000 to points outside the State of Maryland. Accordingly, we find that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, is a labor organization as defined in Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The facts as stipulated show that the Union was certified as bargaining agent for the production and maintenance employees of the Respondent on April 13, 1960,³ and that the Respondent, by letter dated April 21, 1960, refused and continues to refuse to bargain with the certified bargaining agent of its employees.

² Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

³ The complaint alleges, and Respondent admits, that the appropriate unit consists of all production and maintenance employees, including working leaders employed at the Company's Baltimore, Maryland, plant, excluding all office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act.

The Union filed its petition for certification of representatives * on February 2, 1959, and an election was held on March 17, 1959, pursuant to a stipulation for certification upon consent election. On May 15, 1959, the Regional Director for the Fifth Region issued a complaint in Case No. 5-CA-1498, alleging, *inter alia*, that four individuals, who had cast ballots subject to challenge in the earlier election, were discriminatorily discharged on or about January 5, 1959, for engaging in protected concerted [fol. 76] activity. As the challenges were sufficient in number to affect the results of the election, and the eligibility of the individuals who cast the challenged ballots depended upon the resolution of the unfair labor practice case, the Board directed that the two cases be consolidated and heard before a Trial Examiner. The Trial Examiner, after a hearing, found that the four individuals had been unlawfully discharged and that they were therefore entitled to vote; the Board agreed.² The challenged ballots were opened, a Revised Tally of Ballots was issued on April 7, 1960, and the Union, having received a majority of the valid votes, was certified as exclusive bargaining representative on April 13, 1960.

The Respondent's position, as reflected in its Answer to the Complaint and in letters dated April 21, 1960, responding to the Union's request to bargain, is essentially that the findings of the Board in the earlier consolidated representation and complaint case are erroneous, that it is taking steps to review that case in the Court of Appeals for the Fourth Circuit, and that the "Company is not in a position to sit down with the Union and negotiate a contract covering wages and working conditions for the reason that, if the Fourth Circuit ultimately decides the case in favor of the Company, the Company would be under no duty to recognize the Union as the bargaining representative for the Company's employees."

Under these circumstances and upon the basis of the entire record, we find that the Respondent, by its admitted refusal to bargain with the Union, as the certified bar-

* Case No. 5-RC-2682.

² Washington Aluminum Company, Inc., 126 NLRB No. 162.

gaining representative of its employees, on and after April 21, 1960, has violated Sections 8 (a) (5) and (1) of the Act.*

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III, above, occurring in connection with its operations as [fol. 77] described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent refused to bargain collectively with the Union as the exclusive representative of employees in the appropriate unit, we shall order that the Respondent bargain collectively with the Union, upon request, as the statutory representative of the employees in the unit, and if an understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

1. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, is a labor organization as defined in Section 2 (5) of the Act.

2. All production and maintenance employees employed at the Company's Baltimore, Maryland, plant, including working leaders, but excluding all office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

**The Cross Company*, 127 NLRB No. 88; *Old King Cole, Inc.*, 119 NLRB 837, *enf'd* 260 F. 2d 530 (C. A. 6).

3. The above-named labor organization was on April 21, 1960, and has been at all times thereafter the exclusive representative of all the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. By refusing to bargain collectively with the above-named labor organization, as the exclusive representative of all the employees in the unit described above, the Respondent [fol. 78] has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a)(5) of the Act.

5. By the aforesaid conduct, Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in, and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Washington Aluminum Company, Inc., Baltimore, Maryland, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, as the exclusive bargaining representative of employees in the appropriate unit.

The appropriate bargaining unit is:

All production and maintenance employees employed at the Company's Baltimore, Maryland, plant, including working leaders, but excluding all office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

[fol. 79] (a) Upon request, bargain collectively with Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, as the exclusive representative of the employees in the appropriate unit, as found above, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Baltimore, Maryland, plant, copies of the notice attached hereto and marked "Appendix." Copies of such notice, to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, in conspicuous places including all places where notices to employees are customarily posted, and maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Fifth Region, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C.

BOYD LEEDOM, *Chairman*
JOSEPH ALTON JENKINS, *Member*
JOHN H. FANNING, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

'In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order".

[fol. 80] APPENDIX TO DECISION AND ORDER

**NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER**

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

**WE WILL NOT refuse to bargain collectively with
INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit.**

The appropriate bargaining unit is:

All production and maintenance employees employed at the Company's Baltimore, Maryland, plant, including working leaders, but excluding all office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act.

We Will, upon request, bargain collectively with the aforesaid labor organization as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WASHINGTON ALUMINUM COMPANY, Inc.
(Employer)

Dated By (Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 81]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL EXHIBIT 1-C

COMPLAINT AND NOTICE OF HEARING

VII.

On March 17, 1959 a majority of the employees of Respondent in the unit described above in paragraph VI, in a secret ballot election conducted in the matter of *Washington Aluminum Company, Inc.*, Case No. 5-RC-2682, designated the Union as their representative for the purposes of collective bargaining with Respondent, and, by virtue of Section 9, subsection (a), of the Act, at all times since that date has been and is now the exclusive representative of all the employees of Respondent in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. On April 13, 1960 the Regional Director for the Fifth Region issued his Certification of Representative, formally designating the Union as the representative of the employees in said unit for the purposes of collective bargaining.

VIII.

On or about April 15, 1960, while Respondent was engaged in operations described above in paragraphs II, III and IV, the Union requested Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other conditions of employment with the Union as exclusive representative of all employees of Respondent in the unit described above in paragraph VI.

IX.

On or about April 21, 1960 and at all times thereafter, down to and including the date of the issuance of this Complaint, Respondent did refuse and continues to refuse to bargain collectively in good faith with the Union as the exclusive representative of all employees of Respondent in the unit described above in paragraph VI.

JOHN A. PENELLO, Regional Director
National Labor Relations Board,
Region 5, 707 N. Calvert Street, 6th
Floor, Baltimore 2, Maryland.

[fol. 82]

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

GENERAL COUNSEL EXHIBIT 1-D

ANSWER

2. Respondent denies the allegations of Paragraph VII of the said Complaint, except that Respondent admits that the Regional Director for the Fifth Region issued a Certificate of Representative on April 13, 1960, designating the Union as the collective bargaining representative of the Respondent's production and maintenance employees.

3. Respondent admits the allegations of Paragraphs VIII and IX of the said Complaint.

5. Answering further the said Complaint, Respondent says that in the secret ballot election referred to in Paragraph VII of the said Complaint held on March 17, 1959, the final tally would have shown only sixty-nine votes cast for the Union as against seventy-one votes cast against the Union but for the fact that four votes also cast for the Union were votes of four employees of Respondent who had been discharged for cause on January 5, 1959, or almost a month prior to the eligibility date fixed by the Stipulation for Certification Upon Consent Election, that after Complaint and Hearing, the Labor Board ordered reinstatement of said four employees and the counting of the ballots of said four employees but that Respondent asserts that said Order of the Labor Board is in error and is totally unsupported by any substantial evidence contained in the record of the hearing of said case, being Case No. 5-CA-1498, that Respondent is taking steps to review said Order of the Labor Board in the United States Court of Appeals for the Fourth Circuit, and that in the event that the United States Court of Appeals for the Fourth Circuit denies enforcement of said Order of the Labor Board, the Respondent will be under no duty whatsoever to bargain collectively with the Union and will not have engaged in the unfair labor practices alleged in Paragraphs X and XII of the said Complaint.

[fol. 83] WHEREFORE, having fully answered the said Complaint, Respondent prays that the same be dismissed.

ROBERT R. BAIR,
1409 Mercantile Trust Building
Baltimore 2, Maryland
PLaza 2-6780
Solicitor for Respondent

CERTIFICATE OF SERVICE (omitted in printing)

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

GENERAL COUNSEL EXHIBIT 1-E-12

Case No. 5-RC-2682
Date issued April 7, 1960
XX stipulated

REVISED TALLY OF BALLOTS

(Counting of Challenged Ballots)

The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the National Labor Relations Board on March 31, 1960 and the addition of these ballots to the original Tally of Ballots, executed on March 17, 1959, were as follows:

[fol 84]

	Original Tally	Challenged Counted	Final Tally
Approximate number of eligible voters	144 ¹		
Void ballots	0		
Votes cast for: Petitioner	69	4	73
Votes cast against participating labor organization(s)	70	1	71
Valid votes counted.....	139	—	144
Unopened challenged ballots.....	5		0

A majority of the valid votes as shown in the final tally column has been cast for Petitioner.

For the Regional Director—Fifth Region
LOUIS S. WALLERSTEIN.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the final tally, were fairly and accurately done, and that the results were as indicated above: We also acknowledge service of this Tally.

For Employer
ROBERT A. BAIN

For Petitioner
JACK GERSON

¹ As revised by the Board's Order Directing Hearing dated June 30, 1959.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL EXHIBIT 1-F

April 15, 1960.

Washington Aluminum Company, Inc.
Knecht Ave. & Pennsylvania Railroad
Baltimore 27, Maryland
Attn: Mr. Fred Rushton

Dear Sirs:

As the Certified Bargaining Representative for your employees, we are hereby notifying you that we desire to [fol. 85] meet with representatives of the Washington Aluminum Company, Inc. for the purpose of negotiating a Labor Agreement covering wages and working conditions.

Please notify us when a meeting for the above stated purpose would be convenient for you, keeping in mind that we wish to begin negotiations as quickly as possible.

Yours very truly,

JACK GERSON,
Regional Director.

JG/fr
Certified Mail
Return Receipt Requested

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

GENERAL COUNSEL EXHIBIT 1-G

WASHINGTON ALUMINUM COMPANY, INC.
Knecht Avenue & Pennsylvania R. R.
Baltimore 29, Maryland
Circle 2-1000

April 21, 1960.

**Mr. Jack Gerson, Regional Director
Industrial Union of Marine and Shipbuilding
Workers of America, AFL-CIO
111 Cherry Hill Road
Baltimore 25, Maryland**

Dear Mr. Gerson:

This will acknowledge receipt of your letter dated April 15, 1960.

I believe that you have already received a copy of a letter from our counsel, Robert R. Bair, to the National Labor Relations Board dated April 8, 1960, in which Washington Aluminum Company advised the Board that it was unable to comply with the Board's order because it was under the firm conviction that the findings of the Trial Examiner and of the Board were erroneous. In other words, the Company is taking steps to review the entire [fol. 86] matter in the United States Court of Appeals for the Fourth Circuit.

Pending the outcome of the "appeal" to the Fourth Circuit, the Company is not in a position to sit down with the Union and negotiate a Contract covering wages and working conditions for the reason that, if the Fourth Circuit ultimately decides the case in favor of the Company, the Company would be under no duty to recognize the Union as the bargaining representative for the Company's employees. In the event that the Fourth Circuit does decide the matter in favor of the Union, we shall be glad to sit

down with the Union immediately and bargain in good faith a Contract covering wages and working conditions.

Very truly yours,

Washington Aluminum Co., Inc.
FREDERICK N. RUSHTON
President.

FNR/ah
Registered Mail,
Return Receipt Requested

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL EXHIBIT 1-H

WASHINGTON ALUMINUM COMPANY, INC.
Knecht Avenue & Pennsylvania R. R.
Baltimore 29, Maryland
Circle 2-1000

April 21, 1960.

Mr. Jack Gerson, Regional Director
Industrial Union of Marine and Shipbuilding
Workers of America, AFL-CIO
111 Cherry Hill Road
Baltimore 25, Maryland

Dear Mr. Gerson:

By registered letter of even date, herewith, we advised you that the Company is taking steps to review the labor [fol. 87] matter in the United States Court of Appeals for the Fourth Circuit and that, pending the outcome of the "appeal", the Company is not in a position to sit down with the Union and negotiate a Contract covering wages and working conditions. The letter also pointed out that in the event the Fourth Circuit decides the matter in favor of the Union, the Company will sit down with the Union

immediately and bargain in good faith a Contract covering wages and working conditions.

It may be as many as six months before the matter is ultimately disposed of by the Fourth Circuit Court of Appeals. A small number of our employees are now eligible, or in this six months' interim period will become eligible, to receive periodic wage increases which the Company proposes to grant in accordance with its past pattern and practices. The Company does not feel that the unresolved doubts concerning the election of the Industrial Union as a bargaining representative should prejudice the rights of a small number of the employees to wage increases which are deserved and which would have been granted in accordance with the practices of the Company in the absence of any litigation with the Labor Board.

Very truly yours,

Washington Aluminum Co., Inc.
FREDERICK N. RUSHTON,
President.

FNR/ah

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

STIPULATION

VII.

On April 7, 1960, pursuant to the Board's decision, direction and order dated March 31, 1960, in Cases Nos. 5-RC-2682 and 5-CA-1498 (copy of which is attached hereto marked Exhibit E-11), five challenged ballots were opened in the presence of all the parties hereto, as a result of [fol. 88] which a Revised Tally of Ballots (attached hereto marked Exhibit E-12) was issued on April 7, 1960. On April 7, 1960, immediately prior to the opening of said challenged ballots, the Respondent expressly noted an ob-

jection to the opening of four of said challenged ballots on the ground that Respondent was taking steps to review Case No. 5-CA-1498 in the United States Court of Appeals for the Fourth Circuit and that, in the event the United States Court of Appeals for the Fourth Circuit denied enforcement of the said decision, direction and order of the Board dated March 31, 1960, the ballots of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux, Sr. and Warren A. Hovis would be null and void and of no effect. After noting said objection, the board agent, on behalf of the National Labor Relations Board, opened said challenged ballots.

VIII.

On April 18, 1960, Counsel for the General Counsel of the National Labor Relations Board, Fifth Region, forwarded the entire record in the matter of Washington Aluminum Company, Inc. and Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr., William George, Jr. and J. Alfred R. Caron, Case No. 5-CA-1498, to the Circuit Court Enforcement Section of the National Labor Relations Board, Washington, D. C., in order to institute the filing in the United States Court of Appeals for the Fourth Circuit of a Petition for Enforcement of the said decision, direction and order of the Board dated March 31, 1960 in Case No. 5-CA-1498.

IX.

On April 13, 1960 the Regional Director for the Fifth Region issued his Certification of Representative, formally designating the Union as the representative of the employees in the unit described in paragraph VI of the Complaint.

[fol. 89]

X.

The Union made a request upon Respondent for bargaining by letter dated April 15, 1960 which was received by Respondent on April 18, 1960; a copy of said letter is attached hereto marked Exhibit F and is incorporated herein as if fully set forth and rewritten herein.

XI.

Respondent replied to the Union's request referred to in paragraph VIII above by two letters dated April 21, 1960 which were received by the Union in the ordinary course of the mail; copies of said letters are attached hereto marked as Exhibits G and H and are incorporated hereon as if fully set forth and rewritten herein.



[fol. 90]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL EXHIBIT No. 2

That portion of General Counsel Exhibit No. 2 showing
 (a) temperature and (b) wind velocity on the morning of
 January 5, 1959.

U. S. Department of Commerce, Weather Bureau

LOCAL CLIMATOLOGICAL DATA

Baltimore, 'Maryland' (Friendship International Airport)

January 1959

Latitude 39° 11' N.

Longitude 76° 40' W. Elevation (ground) 164 ft. Eastern Standard time used

Date	Temperature (°F)				Precipitation		Snow Sleet or Ice on ground at 7:00 A.M. (In)	Prevailing direction	Wind			Sunshine	Sky cover
	Maximum	Minimum	Average	Departure from normal	Degree days (base 65°)	Total (Water equivalent) (In)	Snow, Sleet (In)		10	11	Fastest mile		
1 2 3 4 5 -18 48	5 22 11 17	0 0	0 0	0 0	0 0	WNW 24.4 43 NW 9:31 100	0 0	10 11 12 13	14 15	16 17	0 1	18	

[fol. 1] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Fifth Region

Case No. 5-CA-1498

In the Matter of:

WASHINGTON ALUMINUM COMPANY, INC.

-and-

ROBERT A. HEINLEIN
FRANK J. ADAMS
FRANK OLSHINSKY
WARREN A. HOBIV
AUGUSTINE AFFAYROUX
WILLIAM GEORGE, JR.
J. ALFRED R. CARON

-and-

Case No. 5-RC-2682

WASHINGTON ALUMINUM COMPANY, INC.
EMPLOYER

-and-

INTERNATIONAL UNION OF MARINE & SHIPBUILDING
WORKERS OF AMERICA, AFL-CIO.
PETITIONER

TRANSCRIPT OF TESTIMONY—August 3, 1959

• • • • •
BEFORE:

LOUIS PLOST, Trial Examiner

[fols. 2-13] • • • •

[fol. 14] J. ALFRED R. CARON

called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

[fols. 15-21] • • • •

[fol. 22] TRIAL EXAMINER: You say you made such a complaint about two weeks before the 5th of January?

THE WITNESS: We had a cold spell then, sir.

TRIAL EXAMINER: Thank you. And you made a complaint then?

THE WITNESS: To Dave Jarvis, the foreman, yes.

[fol. 23] • • • •

[fol. 24] Q. (By Mr. Wescott) Well, Mr. Caron, what was the condition of the plant on Monday mornings when you came in to work as compared to the regular time during the week?

TRIAL EXAMINER: Which Monday morning are you referring to?

MR. WESCOTT: Any Monday morning.

TRIAL EXAMINER: Any Monday morning?

THE WITNESS: It was always cold.

TRIAL EXAMINER: You don't mean in August, do you?

MR. WESCOTT: No. During the winter time.

THE WITNESS: It was cold and the men would be huddled around the furnace trying to get heat; trying to get warm?

Q. (By Mr. Wescott) Was it more cold on Monday morning than it would be during the week, during the winter times? A. Yes, sir, it seemed to be colder on Monday mornings.

TRIAL EXAMINER: It seemed to be or was?

THE WITNESS: Yes, sir, it was colder.

[fols. 25-28] • • • •

[fol. 29] Q. Now, did Mr. Jarvis actually give you permission to leave the shop? A. No, sir.

[fols. 30-33] • • • •

[fol. 34]

CROSS-EXAMINATION

Q. (By Mr. Bair) • • •

[fol. 35-40] • • • •

[fol. 41] Q. Now, in this discussion that you had with Mr. Jarvis in his office, I think you testified that he said [fol. 42] if those fellows had any guts they would go home. Did you say that, Mr. Jarvis was serious in making that statement?

MR. WESCOTT: Objection. I think it calls for subjective thought.

TRIAL EXAMINER: Sustained.

Q. (By Mr. Bair) Did you take this as permission to go home? A. Oh, no, sir. No, sir.

Q. You did not? A. No, sir.

Q. But you at the same time relayed this statement on to the men as you have already testified? A. I told them what Dave had said, and that I was going home. And I said, "What are you fellows going to do?" They told me they were going to go home also because it was too cold to work.

• • • •
[fol. 43-44] • • • •

[fol. 45] Q. And you said on direct that you punched the time clock? A. No. On my way to the time clock, I ran into Dave. I saw him. I said, "I will see you tomorrow, I am going home."

He said, "Okay, Babe, I will see you tomorrow."

Then I punched out and I went home.

Q. So that means you were coming back the next day.
A. Yes, sir. I said, "I will see you tomorrow."

• • • •
[fol. 46-52] • • • •

[fol. 53] ROBERT A. HEINLEIN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Orem) • • •

[fol. 54-55] • • • •

[fol. 56] Q. What did you do then? A. Then I think I laid my lunch on the end of the table. I said to little Willy, I think the little German boy there, that we were [fol. 57] all going home, was he going home too. He said no, he couldn't because he wasn't a citizen and he couldn't get a job any place else.

[fol. 58-59] • • • •

CROSS-EXAMINATION

Q. (By Mr. Bair) • • •

Q. What did he say? A. I said, "How about enough heat in this place because it is cold." We didn't stand in one spot and work. We had to move around.

[fol. 61] Q. As you left the plant, you say you talked to Mr. Jarvis? A. He was coming out of his office toward me as I walked over to pick up my lunch.

[fol. 62] Q. Would you repeat the conversation you had with Mr. Jarvis at that time? A. As he came toward me I said, "Dave, it is awful cold; we are going home." I said, "Aren't you going with us."

He said, "Bob, you know I can't do that."

So I just picked my lunch up and walked out.

Q. Did you tell him why you were going home? A. I said it was too cold to work.

[fol. 63-64] • • • •

[fol. 65]

WILLIAM GEORGE, JR.

was called as a witness, and having been first duly sworn,
was examined and testified as follows:

[fols. 66-68] • • • •

[fol. 69]

CROSS-EXAMINATION

Q. (By Mr. Bair) • • •

• • • •

[fol. 70] Q. Did you notice people working around the
main furnace? A. No, sir.

Q. You did not notice anybody working in that vicinity?
A. No one at all.

[fol. 71] Q. Do you know whether or not the gas space
heaters in the machine shop were operating? A. No, sir.

Q. You don't know whether or not they were? A. No,
sir.

Q. Did you take the trouble to find out? A. No, sir.

• • • •

[fols. 72-74] • • • •

[fol. 75] Whereupon,

FRANK J. ADAMS

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair) • • •

• • • •

[fol. 76] Q. You think it was much colder on this Mon-
day than on other Mondays? A. Yes.

Q. Did you notice whether or not the furnace was
[fol. 77] operating on this particular Monday morning?
A. No, I couldn't say whether it was running or whether
it was off.

• • • •

[fol. 78] Q. Did you intend to return the next day?
A. Yes.

MR. WESCOTT: Objection.

TRIAL EXAMINER: Sustained.

[fol. 79] * * *

[fol. 80] FRANK A. OLSHINSKY

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair) * * *

* * * *

[fol. 81] Q. Did you see any men working about the
furnace on that morning?

[fol. 82] A. No, I didn't.

* * * *

[fol. 83-93] * * *

[fol. 94] WARREN A. HOVIS

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Br. Bair) * * *

* * * *

[fol. 95-97] * * *

[fol. 98] Q. And that that was authority for you to go
home; is that right? A. No that wasn't permission to go
home, no.

Q. You didn't think that was permission to go home?
A. No.

Q. But you thought it was authority to go home? A.
No. I thought it was just that if we had any guts we
would go home.

* * * *

[fol. 99] * * *

[fol. 100]

WILHELM TAPELMAIER

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

* * * * *
DIRECT EXAMINATION

Q. (By Mr. Bair) * * *

[fol. 101] * * * *

[fol. 102] Q. Where was Mr. Jarvis when you spoke to him? Where was he standing? A. About ten feet from his office.

Q. From his office? In the machine shop? A. In the machine shop, yes, between my lathe and his office.

[fol. 103] Q. (By Mr. Bair) As you were talking with Mr. Jarvis about ten feet from his office, did you see the men walking out of the plant? A. Oh, at this time the men was already walked out. They was already gone.

[fol. 104]

CROSS-EXAMINATION

Q. (By Mr. Wescott) * * *

[fol. 105-116] * * * *

[fol. 117] Q. Are you sure of that? A. Yes, I am sure of that.

Q. Could he have and you might not have heard him? Would that be possible?

A. No.

[fol. 118-130] * * * *

[fol. 131]

DAVID N. JARVIS

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair) • • •

[fol. 132] • • • •

[fol. 133] Q. How large are these doorways that lead from "A" shop into the machine shop, in terms of width and height? A. I have to guess. I will say 10 feet wide and 8 or 9 feet high.

Q. And there are two doorways that lead into the machine shop area from "A" shop? A. There are three really. But concerning the heat from the big furnace, there were two in that vicinity.

Q. Were there any other openings from which you could pass from the machine shop to a shop? A. Yes, we knocked out the top two rows of windows separating "B" shop from "A" shop so that the heat from the entire building, from "A" building, would come through, and also from "C" shop on the other side.

[fol. 134-138] • • • •

[fol. 139] Q. What is your authority as to granting leave of absence of men? A. Well, here again we had a relatively small company in a sense. And a lot of the rules and so forth were unwritten agreements more or less. It was something you understood.

In this sense if a man specifically, or one man would come and ask for time off, perhaps, say, a portion of a day—let's start it that way—I could say well, make a decision on this. If seven people wanted to go home and closed the machine shop down I didn't have that authority. If a man wanted two or three days off I would go to see Art Wampler or Ray Caron.

Q. Who are these people? A. Art Wampler is the general foreman. Ray Tarrante was the plant manager.

TRIAL EXAMINER: There was no written rule on it, was there?

[fol. 140] THE WITNESS: No, sir.

Q. Would you have authority to permit a man to go home if he were ill? A. Yes.

Q. Did such a thing ever happen? A. Yes. On occasion personnel from the shop would become ill, and I not only would grant permission for them to go home, but in instances I would provide transportation. I have sent men home by company's drivers.

In one instance, I took a man home myself.

[fols. 141-143] • • • •

[fol. 144] Q. Now, there has been some testimony here that Mr. Adams spoke to you as he was leaving. Do you remember that conversation? A. No, sir, not at all.

Q. There has also been some testimony here that Mr. Caron spoke to you half way between your office and the time clock. Do you remember that conversation? A. No, not at all.

Q. Did such a conversation take place? A. No.

[fols. 145-156] • • • •

[fol. 157] TRIAL EXAMINER: That is merely worn to protect their shirt isn't it, to keep oil and grease off of it? It isn't worn for warmth, is it?

THE WITNESS: Yes, sir. They flannel-line them nowadays.

TRIAL EXAMINER: Beg pardon!

THE WITNESS: I say they have flannel lining in them.

TRIAL EXAMINER: Did they at that time?

THE WITNESS: Yes, sir. I have one at home at the moment.

TRIAL EXAMINER: I see. And they wore that ordinarily at their work?

THE WITNESS: Yes, sir.

[fol. 158] TRIAL EXAMINER: But in any event, you say it was at least noon before—it was after lunch before it was warm up in that plant that they could take off excess clothing to work?

THE WITNESS: Yes, sir.

[fol. 159] • • • •

[fol. 160] CROSS-EXAMINATION

Q. (By Mr. Wescott) • • •

[fol. 161] • • • •

[fol. 162] Q. And you were standing at the corner of your office, was that correct, when you saw the men going out? A. Yes.

Q. How far were you from the men? A. As I said before, I am not sure of the number of feet.

Q. Would you say it was more than 15 feet or 20 feet? A. Yes, I think so, yes.

[fol. 163] • • • •

[fol. 164] TRIAL EXAMINER: He meant he knew why they left when he talked to Mr. Rushton, because they were gone?

MR. WESCOTT: Yes, sir.

[fol. 165-166] • • • •

[fol. 167] TRIAL EXAMINER: It isn't worn for warmth, except that it might be lined with flannel in the winter time?

THE WITNESS: Well, I have one. And I wear mine for warmth.

[fol. 168-175] • • • •

[fol. 176] RAYMOND G. TARRANT

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair) • • •

[fol. 177] Q. Mr. Tarrant, I hand you a paper marked General Counsel's Exhibit No. 3, and I ask you if you can identify that? A. Yes. This is a lay-out of our plant which shows the heating arrangement of the main area of the plant.

Q. And I notice that there are certain markings in blue and certain markings in red.

Can you testify as to the accuracy of all those statements in blue and in red?

A. To the best of my knowledge these are as they are in the plant. The furnace in "A" shop is shown as a Drayvo Space Heater with 1,500,000 Btu.

Q. Is that accurate? A. That is, yes, sir.

Q. And there is another furnace in "A" shop at the lower part of the exhibit marked Drayvo Space Heater, [fol. 178] 500,000 Btu, is that accurate? A. Yes, sir, it is.

Q. Do both of those furnaces contribute to heating the "A" shop? A. Yes, they do.

Q. The areaway between the lower portion of "A" shop and the upper portion is open, is it not? A. Yes, it is one building.

[fols. 180-182] • • • •

[fol. 183] Q. (By Mr. Bair) Whom did you talk to? A. I spoke to Affayroux when he returned to the plant that day.

Q. What did Mr. Affayroux say to you? A. He told me that he had gone to the diner for a cup of coffee. He said he had been cold and he wasn't feeling well. And he came back. He had been informed that he had been discharged. And he wanted to go back to work.

Q. Did you talk to Mr. George after that morning? A. Yes. I had a telephone call from Mr. George.

Q. What discussion took place? A. Mr. George called me and he said that you know what has happened. I told him, yes, certainly I was aware of it. He said that he had had a discussion. He said he and his wife had [fol. 184] talked about this quite extensively. And he realized that they had made quite a serious mistake in walking off the job that morning. And he said he had

always enjoyed working at Washington Aluminum. And he realized that certainly some disciplinary action should be forthcoming.

He said, however, if we saw fit that he would like to have the opportunity to come back in.

[fols. 185-196] • • • •

[fol. 197] GEOFFREY T. JONES

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair) • • •

• • • •

[fol. 198] Q. Would you give a definition of a Btu? A. Well a basic definition of a Btu is defined as the amount of heat required to raise one pound of water one degree fahrenheit.

However, there are other definitions or equivalents, as 778 foot pounds of energy, or it is approximately .0003 kilowatt hours.

Q. But the basic definition is what? A. The basic definition is the amount of heat required to raise the given substance a given number of degrees.

Q. In this case it was a pound of water one degree [fol. 199] fahrenheit? A. That is the basic definition, yes.

Q. I show you General Counsel's Exhibit No. 3 and point out in the center of the exhibit a space marked Dravo Space Heater, 1,500,000 Btu. And down below another space marked Dravo Space Heater, 500,000 Btu. Are you familiar with those two heating units in the "A" shop of Washington Aluminum Company? A. I see them almost every day.

Q. Now, I ask you whether the 1,500,000 Btu and the half million Btu referred to output or input? A. They refer to the output of the machine.

• • • •

[fols. 200-202] • • • •

[fol. 203]

Roy V. Rose

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

[fols. 204-206] • • • •

[fol. 207]

CROSS-EXAMINATION

Q. (By Mr. Wescott) • • •

• • • •

Q. (By Mr. Wescott) Will the furnace put out a full capacity? Does it generally put out a full capacity?
A. Yes.

• • • •

[fol. 208]

FRED N. RUSHTON

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr., Bair) • • •

• • • •

[fol. 209-216] • • • •

[fol. 217] Q. Did Mr. Adams talk to you later? A. Yes.

Q. When and where? A. Well it is pretty hard to say where. I would say within a few days or a week maybe. I don't know.

But he did call me on the phone, and Frank, I would say, is one of our old employees, and we both felt very bad about it. And Frank mentioned that he was sorry. And I certainly was sorry. These are good men.

And he said that he thought he was in the wrong, and maybe he could come back. I said, Frank, we will have to wait a little bit and see how this thing works out.

• • • •

[fols. 218-238] • • • •

[fol. 239] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL
LABOR RELATIONS BOARD—Filed September 10, 1960

To the Honorable, the Judges of the United States Court
of Appeals for the Fourth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its separate Orders issued on March 31, 1960, and August 16, 1960, against Respondent, Washington Aluminum Company, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, in Cases Nos. 5-CA-1498 and 5-CA-1696 respectively on the docket of the Board.

In support of this petition the Board respectfully shows:

1. Respondent is engaged in business in the State of Maryland, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

2. The complaint in Case No. 5-CA-1498 alleges that respondent had unlawfully discharged seven of its employees in violation of Section 8(a)(1) of the Act. Upon due proceedings had before the Board in said matter, the Board on March 31, 1960, duly stated its findings of fact and conclusions of law, and issued an Order directed to

the respondent, its officers, agents, successors and assigns, which required, *inter alia*, that respondent offer full and immediate reinstatement to said discriminatees.

[fol. 240] 3. The complaint in Case No. 5-CA-1696 alleges that respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the certified representative of its employees. In the representation proceeding before the Board which led to the certification of the representative of respondent's employees, and upon which the Board's order in Case No. 5-CA-1696 is based in part, respondent challenged the ballots of certain employees whom the Board found in Case No. 5-CA-1498 to have been unlawfully discharged. Inasmuch as the determination of the validity of the challenged ballots turned upon the same determination to be made in Case No. 5-CA-1498, i.e., whether the employees who cast such ballots were unlawfully discharged, the hearing thereon in the representation case was consolidated with the hearing in Case No. 5-CA-1498. Accordingly, upon issuance of its order in Case No. 5-CA-1498, the Board also directed that the challenged ballots be opened and counted, and that the Regional Director of the Fifth Region of the Board prepare and serve upon the parties concerned a Supplemental Tally of Ballots in said representation election. The Board's Direction and Order containing such determination and directives was served upon respondent by sending a copy thereof postpaid bearing Government frank, by registered mail, to respondent's counsel of record. Thereafter the challenged ballots were opened and counted, in accordance with the Board's Direction and Order, and on April 13, 1960, there issued the Board's certification of the representative of respondent's employees. Subsequent thereto respondent refused upon request, to recognize or bargain with the representative so certified, and the charge and complaint in Case No. 5-CA-1696 followed.

4. Upon due proceeding had before the Board in Case No. 5-CA-1696 the Board on August 16, 1960 duly stated its findings of fact and conclusions of law, and issued an Order directed to respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision

and Order was served upon respondent by sending a copy [fol. 241] thereof postpaid bearing Government frank, by registered mail, to respondent's counsel of record.

5. For the reasons stated in paragraphs 2, 3 and 4, above, Cases Nos. 5-CA-1498 and 5-CA-1696 present substantially a common record and involve a common legal issue, *viz.*, whether the employees involved in Case No. 5-CA-1498 were unlawfully discharged. It is accordingly appropriate that these cases be presented to the Court as a single proceeding, and that a single petition be filed for the enforcement of the Orders in both cases.

6. Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 27(7) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits, stipulations and other material comprising the entire record of both proceedings before the Board upon which said Orders were entered, which transcript includes the pleadings, testimony and evidence, stipulations, findings of fact, conclusions of law, and the Orders of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcripts to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, evidence, and stipulations, and the proceedings set forth in the transcript and upon the Orders made thereupon a decree enforcing in whole said Orders of the Board, and requiring respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 9th day of September, 1960.

[fol. 242] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 243]

DOCKET ENTRIES

September 10, 1960, notification of the filing of petition for enforcement, together with a copy of the petition, transmitted by mail to the respondent, Washington Aluminum Company, Inc., at Knecht Avenue and Pennsylvania Railroad, Baltimore 27, Maryland.

September 13, 1960, appearance of Dominick L. Manoli, Associate General Counsel, and Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, entered for the petitioner.

September 16, 1960, appearance of Robert R. Bair entered for the respondent.

[fol. 244]

[File endorsement omitted]

**IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

[Title omitted]

ANSWER TO PETITION FOR ENFORCEMENT—filed September 17, 1960

Washington Aluminum Company, Inc., Respondent, by Robert R. Bair and Venable, Baetjer and Howard, its attorneys, for its Answer to the Petition for Enforcement of Orders of the National Labor Relations Board filed herein, respectfully says:

1. Answering Paragraph 1 of said Petition, Respondent admits the allegations thereof.
2. Answering Paragraph 2 of said Petition, Respondent admits the allegations thereof.
3. Answering Paragraph 3 of said Petition, Respondent admits the allegations thereof.
4. Answering Paragraph 4 of said Petition, Respondent admits the allegations thereof.
5. Answering Paragraph 5 of said Petition, Respondent admits the allegations thereof.

6. Answering Paragraph 6 of said Petition, Respondent admits the allegations thereof.

7. Further answering said Petition, Respondent says that the Orders of the Board issued on March 31, 1960 [fol. 245] and August 16, 1960 are based upon findings of fact and conclusions of law of the Trial Examiner and the Board in Case No. 5-CA-1498 which are erroneous and totally unsupported by any substantial evidence contained in the record of Case No. 5-CA-1498.

WHEREFORE, having fully answered the said Petition, the Respondent prays that the same be dismissed.

/s/ Robert R. Bair

/s/ Venable, Baetjer and Howard
1409 Mercantile Trust Building
Baltimore 2, Maryland
Plaza 2-6780
Attorneys for Washington Aluminum
Company, Inc., Respondent

September 16, 1960

[fol. 246] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 247]

DOCKET ENTRIES

September 17, 1960, notification of the filing of answer to petition for enforcement, together with copy of answer, transmitted by mail to the National Labor Relations Board, Health, Education and Welfare Building, Washington 25, D. C.

September 20, 1960, statement of petitioner under section 3 of rule 10, filed.

September 20, 1960, statement of respondent filed.

[fol. 248] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8211

[Title omitted]

**STIPULATION AS TO JOINT APPENDIX—filed September 20,
1960.**

It is hereby stipulated by and between the parties here-to that, subject to the approval of the Court, a Joint Appendix to their briefs be prepared by both parties in lieu of a separate Appendix to each brief.

It is further stipulated that in the preparation of said Joint Appendix, each party shall designate so much of the record as it wants included, that Petitioner shall arrange for the printing of said Joint Appendix and shall file it in Court with its brief, and that the costs of printing said Joint Appendix shall be borne by each party in proportion to the amount of the Record it has designated.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

/s/ Robert R. Bair, Counsel for
Washington Aluminum Co., Inc.,

[fol. 249]

DOCKET ENTRIES

October 14, 1960, joint appendix filed.
October 21, 1960, transcript of record filed.
December 6, 1960, brief for petitioner filed.
December 22, 1960, brief for respondent filed.
January 11, 1961, appearance of Samuel M. Singer, Attorney, National Labor Relations Board, entered for the petitioner.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
January 11, 1961

January 11, 1961, (January Term, 1961) cause came on to be heard before Sobeloff, Chief Judge, and Haynsworth and Borenman, Circuit Judges, and was argued by counsel and submitted.

[fol. 250]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

*On Petition for Enforcement of Orders of the
National Labor Relations Board*

Argued January 11, 1961

Before SOBELOFF, Chief Judge, and HAYNESWORTH and
BOREMAN, Circuit Judges.

Samuel M. Singer, Attorney, National Labor Relations
Board, (Stuart Rothman, General Counsel; Dominick
L. Manoli, Associate General Counsel; Marcel Mallet-
Prevost, Assistant General Counsel, and Solomon I.
Hirsh, Attorney, National Labor Relations Board, on
brief) for Petitioner, and Robert R. Bair (Venable,
Baetjer & Howard on brief) for Respondent.

[fol. 251]

OPINION—June 3, 1961

BOREMAN, Circuit Judge:

This case is here on petition of the National Labor Relations Board for enforcement of two orders against the Washington Aluminum Company directing it to reinstate

certain discharged employees (126 NLRB No. 162) and to bargain in good faith with a union which was chosen as the collective bargaining representative only by counting the challenged ballots cast by the discharged workers in a representation election (128 NLRB No. 79). Upon a review of the whole record in this case, for the reasons hereinafter discussed, we conclude that enforcement of both orders should be denied.

The Washington Aluminum Company is engaged in the fabrication of aluminum products at a plant in Baltimore, Maryland. As part of its plant facilities, the company maintains a machine shop employing nine men, including a foreman and a shop leader. The machine shop is a rectangular structure with floor space measuring approximately forty by seventy-five feet. The shop contains two gas space heaters with a capacity of 85,000 B.T.U., one located in the aisle of the shop and the other at one end of the building. The opposite end of the shop is heated by an oil fired furnace with a capacity of 1,500,000 B.T.U. situated in an adjacent shop building designated as the "A" shop, which is equipped with ducts one of which carries heated air directly into the machine shop area. In November of 1958, an additional furnace with a capacity of 500,000 B.T.U. was installed in the "A" shop, and the two top rows of windows in the partition separating this shop from the machine shop were removed to allow additional heat from this new furnace to flow into the machine shop building.

[fol. 252] Customarily on nights and weekends, these heating units are turned off when the plant is closed, not to be turned on again until 5:00 A.M. on the morning the work force is to return. However, on cold nights and weekends, the plant watchman, one Battaglia, who is charged with the responsibility of maintaining proper heating conditions in the plant during these times, is under standing orders to turn on all the furnaces and heaters at such regular intervals as may be necessary to the maintenance of suitable temperatures throughout the plant.

On Monday, January 5, 1959, Battaglia turned on all the heaters and furnaces at approximately 1:00 A.M. and left them on for about one and one-half hours. At 5:00

A.M., he again started up the two gas space heaters in the machine shop and the smaller and newer of the furnaces in the "A" shop. He was unable, however, after several attempts, to put in operation the larger furnace in the "A" shop. When the machine shop foreman, one Jarvis, arrived for work he found the larger furnace in the "A" shop not functioning and he and Battaglia informed the plant electrician, Rose, upon his arrival at work sometime between 7:00 and 7:15 A.M., that the furnace was for some reason mechanically inoperative. This particular furnace had ceased functioning temporarily several times since its installation although it had always been easily and quickly repaired. Rose discovered on this occasion that a control switch in the back of the furnace was in a certain position which, though it would permit the blower fans to function, would keep the electrodes from igniting the furnace fire. He immediately manipulated the control to its automatic position and the furnace shortly thereafter commenced to heat up in its normal manner. This mechanical adjustment had been made by approximately 7:30 A.M. and by the time the work whistle first [fol. 253] sounded calling the employees to work.

The diminished heat output in the machine shop, due to the temporary functional failure of the large "A" shop furnace, was accentuated by the unusual weather conditions then prevailing in the Baltimore area. The temperature at 8:00 A.M. was but 15°, the high reading for the entire day was only 22° and the low reached 11° for an average reading of 17°, which was a minus 18° deviation from normal readings for the month. The low temperatures were additionally accentuated by the highest wind velocities recorded for the whole month.

Due to the extremely cold weather, the company president, one Rushton, had gone to the plant at ten o'clock on Sunday evening, January 4, to direct Battaglia to make certain that the plant's heaters and furnaces were turned on frequently during the night so as to insure proper working conditions when the employees came to work the following morning.

When the machine shop employees did report for work Monday morning between the approximate times of 7:10 and 7:30, they found the machine shop to be noticeably

and uncomfortably cold. The condition of the shop was variously described by the employees as "cold," "colder than other days," "colder than usual," "very cold," "real cold" and "extremely cold." When the first of the workmen to arrive, one Caron, the shop leader,¹ reached the [fol. 254] machine shop he went directly to the foreman's office. During the course of an ensuing conversation, the cold condition of the shop was mentioned and foreman Jarvis remarked to Caron, at some point after the other shop employees had arrived, that "if those fellows had any guts at all, they would go home." Although there was some question as to the import intended by Jarvis,² and as to the exact phrasing, there was no dispute that this statement, or one similar thereto, was in fact made. Shortly thereafter Caron went back to the machine shop work area and repeated Jarvis's remark in the presence of the other workers, none of whom had then started work. Caron thereupon told the other employees he was leaving and asked what they intended to do. He then left the machine

NOTE: So that the pertinent facts and circumstances may be fairly presented, we shall resort, at least in part, to copious footnotes.

¹ Caron's duties as "shop leader" were to assign the other workmen to the machines, to assist them and help plan their work schedules. He was not empowered to hire or fire, to grant permission for absence from work, or to allow a man time away from his work in the plant. These functions were vested wholly in machine shop foreman Jarvis and in higher management.

² Jarvis testified as to the tenor of the remark as follows:

"A. Well, we—I tried to be most frank with Mr. Caron on everything that we did. I tried to have here a man that if need be could replace me in the shop, or was fully aware of what was going on. We also worked together, as I said before; and, therefore, I was under the impression that things of this nature that we had said and had been said prior to this at various times, such as if we had a bad job, why, I think—I think one specific job, I remember, we had a landing gear we were working on. Something went wrong with it. And remarks were made to the sense that 'grab your tool box and let's go, this job is all fouled up.' Something of that nature. This was more or less our relationship. I don't know how I can dress that up any more, or make it any clearer."

shop alone but was closely followed by six of the other employees. Although there was an unwritten but well-known and long established company rule requiring that any employee leaving work first obtain permission from his foreman, and though the seven employees who walked [fol. 255] out were admittedly familiar with this rule, none sought the permission of Jarvis before leaving.³

Immediately after his conversation with Caron and shortly before the subsequent walkout, Jarvis left the machine shop to go to the plant shipping department, returning only a "few minutes after the whistle had blown" or a little past 7:30 A.M. As he entered the shop, Jarvis saw several of the men heading toward the exit. Before he had reached the departing workmen, Jarvis passed by one Tafelmaier, another machine shop employee, and requested that Tafelmaier stay at his machine, which he did. Jarvis testified that during the time of his brief remarks to Tafelmaier the seven other men had gone out of the shop and, consequently, he had no opportunity to inquire as to their reasons for leaving or to request them also to remain.⁴

³ Jarvis testified that although he had authority to grant single employees time off for part of a day, by general understanding permission for any employee to be absent from work for a period of several days, or for more than one employee to leave at the same time, except in cases of illness, would have to be granted by Wampler, the general plant foreman, or by Tarrant, the plant manager.

⁴ Although Jarvis testified that he had heard one of the departing employees yell "[w]e are going home," he firmly denied having participated in any conversation with any employees other than Tafelmaier at the time of the walkout. Employee Caron, however, testified that as he was leaving he passed Jarvis and "might" have said, "I will see you tomorrow, I am going home," receiving the reply, "Okay, Babe, I will see you tomorrow." Employee Heinlein testified that as he departed he had asked Jarvis, "Aren't you going with us," to which Jarvis answered, "You know I can't do that." Another employee, Adams, when asked if he had said anything to Jarvis before leaving, said, "I told him I am cold, Dave, I am sick, and I am going home."

The General Counsel affirmed at the hearing before the Trial Examiner that the Board would not contend that the employees

[fol. 256] The immediate result of the walkout was to leave only Tafelmaier and Jarvis himself in the machine shop. In order to complete what general plant foreman Wampler termed "critical" jobs that were at the time being processed in the machine shop, Wampler supplied Jarvis with two temporary workers who had to be taken from their normal assignments in other departments of the plant. At approximately 8:20 A.M., company president Rushton arrived at the plant and, noticing these men and the absence of the seven regular workmen as he passed through the machine shop, asked Jarvis what had occurred. When he was told the men had walked out before starting work, he said to Jarvis, "We are going to terminate them." Rushton then called Jarvis and plant manager Tarrant to an office, discussed the situation with them and told them of the final decision to discharge all of those who had walked out. Four of the men, Adams, George, Hovis and Olshinsky, were sent telegraphic notices of dismissal by the company personnel officer. When employee Affayroux returned to the machine shop at 9:00 o'clock that same morning from a nearby restaurant where he had gone for a cup of coffee, Jarvis personally informed him of his discharge. The remaining employees, Heinlein and Caron, were then contacted and notified by telephone.

Although there was some question as to the actual time at which a final and effective decision to terminate the [fol. 257] men had been reached,⁵ they were undeniably

participating in the walkout had obtained permission therefor from any source as was required by company rule.

Moreover, accepting the above remarks as having in fact been made, it should be noted that only the third referred in any manner to the heating condition in the machine shop. None of them embodied a query as to the cause or probable duration of the cold, none alluded to the cold as the specific cause of the walkout and not one contained any form of a request that the condition be either investigated or alleviated.

⁵ Foreman Jarvis testified that when company president Rushton first arrived in the machine shop at approximately 8:30 A.M. and had noticed the absence of the regular workmen, he had said, "these people left the premises unauthorized, and I want them discharged." Jarvis further testified that he and Wampler then held a meeting with Rushton to discuss the discharges before the men were notified of their terminations. Wampler testified

discharged within a short time after the walkout and before replacements had been hired. Although there was further dispute as to the company's real motivation for the discharges,¹ the Trial Examiner concluded that the

the decision to discharge was made between "9 and 9:30" by himself, Jarvis and Rushton. Rushton testified that when he noticed the absent men in the machine shop he stated to Jarvis, "Dave if they have all gone, we are going to terminate them," but had added, "[w]ell, before you do that now, I want a list of these people, whoever they are." Rushton further stated he first discovered the men had left without their foreman's permission at the meeting with Jarvis and Wampler and that the final decision to discharge was reached about 9:00 A.M., just before he left the plant.

* The Trial Examiner briefly found that Rushton's testimony that "the real reason [was] because they didn't inform the foreman of the action they were taking," was "merely the statement of an afterthought." The above quoted statement of Rushton's was elicited during the following colloquy with the Trial Examiner:

"THE WITNESS [Rushton]: Well, the real reason of course is that I was very upset at the foreman for not getting the information from those fellows, not getting the—

TRIAL EXAMINER: Is that the reason you discharged the men, because the foreman didn't get the information?

THE WITNESS: The real reason is because they didn't inform the foreman of the action they were taking.

TRIAL EXAMINER: Is that the reason you discharged them?

THE WITNESS: That, plus the disciplinary action." (Emphasis supplied.)

Jarvis testified that Rushton had stated he would discharge the men because "they had left the premises unauthorized. And this curtailed our operation. And this they were discharged for." Wampler, the general foreman, who also participated in the discharge discussions, further testified as follows:

"Q. Why did you fire these men?

A. For violating plant rules, leaving the plant without permission, and to maintain discipline.

TRIAL EXAMINER: Wait a minute. Violating plant rules and leaving the plant without permission is the same thing, isn't it?

THE WITNESS: Well, they left without the foreman's permission.

TRIAL EXAMINER: All right. They left without permission. And they violated the plant rule when they left without

[fol. 258] employees participating in the walkout had been engaged in a "concerted refusal in the course of their employment to perform any services for Respondent [the company] in protest of certain working conditions, to wit, the failure of Respondent to supply adequate heat in their place of employment." Since the men were thus determined to have been "economic strikers," the Trial Examiner then held the discharges made before replacements were hired unlawful under section 8(a) (1) of the act, and that the employees therefore retained their employee status and were entitled to reinstatement with back pay.

The Board affirmed the Trial Examiner's report, modifying it only by adding particular emphasis to the testimony of employee Hovis to the effect that "[w]e all got together and thought it would be a good idea to go [fol. 259] home; maybe we could get some heat brought into the plant that way;" the testimony of three of the discharged employees as to prior complaints about cold conditions in the machine shop; and the circumstance of the men leaving in a body, all at about the same time. There was one element in the intermediate report, however, not touched upon or developed by the Board in its opinion, which we believe points up the crucial factor precluding enforcement of the Board's orders in this proceeding.

permission, didn't they? It is the same thing, isn't it?

THE WITNESS: Yes, I would say so.

TRIAL EXAMINER: And to maintain discipline, you didn't fire them for that?

THE WITNESS: No, not for that reason.

TRIAL EXAMINER: Then you fired them because they left the plant?

THE WITNESS: Correct.

TRIAL EXAMINER: Without permission?

THE WITNESS: Correct."

Beyond concluding that one of Rushton's several statements was an "afterthought," the Trial Examiner held only that "by their [the employees] concerted activity * * * [they] were economic strikers * * * that by reason of their being discharged before they were replaced, they continued to so remain and were therefore unlawfully discharged employees * * * The Trial Examiner made no further findings as to the company's reasons for the discharge and the Board's decision is silent on the point.

In the text of his report, the Trial Examiner alluded only briefly to the presentation or specification of a demand or grievance by the employees by noting "the fact that they [the employees] were discharged before they had an opportunity to formally elect a committee to deal with the Respondent [the company] with respect to the adjustment of their grievance (as argued by the Respondent) is of no moment." While we do not intimate that it should ever be thought that employees not represented by a union are required to effect some sort of formal organization of a grievance committee of their fellows to submit their claims to management prior to a concerted protest of employer practices thought to be unfair, the record here before us manifests a conspicuous and total absence of any action on the part of the employees to attempt to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company prior to the walkout.

There is little question that working conditions in the company's machine shop were less than comfortable on the morning of the walkout. The employees all testified that the shop on this morning was "cold" if not "extremely cold"; employee George testified that when he arrived at [fol. 260] work that day he found a small icicle on one of the pipes of the water cooling system of a welding machine; employee Tafelmaier, the one worker not joining in the walkout, worked that morning until about 10:30 wearing his overcoat; foreman Jarvis testified that the shop was "a bit uncomfortable" until around 10:00 A.M. and that it was not until lunch time or shortly thereafter that the men then working in the shop removed extra coats or sweaters they had worn during the morning. In addition, Caron testified that shortly before the walkout he had observed his fellow workers "huddled" together and "shivering" in the cold.

It is apparently undisputed that the coldness was in great part attributable to inclement weather on one of the coldest days experienced during the winter of 1958-59, and that the abnormal freezing temperatures were intensified by the most severe winds of the entire month. Moreover, it is clear the company was fully aware of its

responsibilities to combat these conditions for, although the plant watchman was under standing instructions as stated, the company president himself visited the plant the evening before the walkout to insure that adequate heat would be provided the employees the following morning. While the watchman was unable to fully carry out these orders, this was undeniably due to the unexpected mechanical failure of one of the plant furnaces, a condition beyond the control of the company and one quickly and effectively remedied. The plant electrician attended to the matter immediately after his arrival at work, the furnace was operative by the time the men were to have started work at 7:30 A.M., it was heating to its full capacity within five to eight minutes thereafter, within twenty minutes heat from its directional ducts was being forced forty or fifty feet into the machine shop, and before lunch time this area had been heated to normal work-[fol. 261] ing temperature.

There was some variation in the testimony of the employees as to the real reason for the walkout.⁷ But even if it be assumed their sole purpose was to protest the low temperature of their place of employment, we do not believe their actions should be considered a protected activity under the facts and circumstances here presented. One of the fundamental policies of the National Labor Relations Act, 29 U.S.C. § 151 (1958), is to secure industrial peace and prevent strife and disruption by en-

⁷ Caron testified that just prior to leaving he turned to his fellow workers and said, "[w]ell, Dave told me if we had any guts, we would go home," and "I am going home, it is too damned cold to work"; Heinlein testified that upon hearing this statement of Jarvis's he answered by stating "[i]t is all right with me, I am going home too"; George and Olshinsky also stated they left in part because of Caron's repetition of Jarvis's remark and, additionally, because of the cold; Adams also stated he left because of the remark and, although he had not sought permission to leave, for the further reason that he had been running a fever which subsequently led him to obtain a doctor's certificate of illness; Affrayroux walked out—because of the cold and because he wanted to "stick" with the others; and Hovis because he had thought that "maybe we could get some heat brought into the plant that way."

couraging negotiation and peaceful procedure for the attempted settlement of the demands of a party. That is not to say that employees may not, under any circumstances, exert concerted pressure on their employer in their efforts to gain compliance with their demands. However, the office of a demand as a condition upon the use of concerted pressures is well recognized. As this court stated in *Jeffery-De Witt Insulator Co. v NLRB*, 91 F. 2d 134, 138 (4th Cir. 1937):

" * * * 'A strike,' in such common acceptation, is the act of quitting work by a body of workmen for [fol. 262] the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused."

An important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer.

In the instant case, none of the concerned employees made any statement before, during or subsequent to the walkout which alluded in any way to a demand that measures be taken to investigate or alleviate the cold in the machine shop.* Each of the employees admitted he had

* This general principle is discussed in *RESTATEMENT, TORTS* § 797, comment *a* (1939), as follows:

"A strike is a concerted refusal by employees to do any work for their employer * * * until the employer grants the concession demanded. * * * [*I*]t is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will." (Emphasis supplied.)

* Attempting to develop the theory of a long standing labor dispute, the Board cited testimony of the employees consisting of the following responses to questions as to whether they had ever complained of their working conditions: Heinlein answered, "I have frequently on occasion remarked to Mr. Rushton as he went through the building, and also to Mr. Esender [a former production manager but production co-ordinator at the time of the walkout], and I think Bill Campbell [also a former production manager employed in the estimating department when the

[fol. 263] made no attempt to ascertain the cause of the condition, and all testified they were unaware of the temporary failure of the larger "A" shop oil furnace and did not know it had been effectively repaired *by the time they were to have started work.* Had they made some effort to request improvement of the condition in the machine shop prior to abandoning work, it is evident from the record their efforts would have been rewarded. While the shop was undeniably cold at the time the men left, conditions in the shop gradually improved, as a result of the furnace repair, to the point where those then in the shop were working in normal comfort. Not only had the company, on its own initiative, done all that it could to relieve the cold *before* the walkout, there is nothing in the record to indicate that a requested adjustment of the problem could not otherwise have been effected. Indeed,

walkout occurred]." When asked when he had so complained, Heinlein answered, "It may have been two or three times during the six months before that. Maybe a year before that. Maybe two years"; George said he had complained to "Mr. Esender and Mr. Jarvis," but amplified this by explaining that he had simply asked "why the large furnace wouldn't put out more heat"; and Caron testified, "I used to talk to Dave [Jarvis] that it was cold and miserable" but he could not recall any specific occasion when he had in fact so complained.

Conversely, foreman Jarvis testified "the complaints were in line of general griping that you have in the lot. It is either too cold or too hot or something of that sort," and stated that he had never received a specific request for management action. Tarrant and Wampler both testified they had never heard specific complaints about the cold or received requests concerning such conditions in the shop but had only heard "conversation" about weather conditions in general. The only other member of management testifying on the point, president Rushton, described the employees' comments as "gripes" such as "It is cold today. No more than we have talked about the heat last week, it has been pretty unbearable."

Accepting the prior "complaints" or "gripes" at full face value, it is notable that not one, with the exception of George's query "why the large furnace wouldn't put out more heat," was of the nature of a demand or request of the company. Moreover, as will be developed, had a question similar to George's prior inquiry been made on the day of but before the walkout, the lack of necessity for such a disruptive protest would have been readily apparent.

the refusal of the employees to seek explanation of the cause of the condition and a correction is heightened by the unquestioned privilege they all possessed, that is, to simply request the plant maintenance man to turn up the thermostats on any or all of the various heaters and furnaces the men knew to be functioning at the time of their walkout.

[fol. 264] In none of the cases cited by the Board in this proceeding was there the total absence of a demand by the protesting employees as is here apparent.¹⁰ In the instant

¹⁰ In *NLRB v. Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957), the employees had complained of excessive heat through their union steward and the union president to both their foreman and management and, before walking out, they again sought permission to leave work through their union steward and president; in *NLRB v. Solo Cup Co.*, 237 F. 2d 521 (8th Cir. 1956), the employees shut down their machines and immediately demanded discussion with the plant manager concerning the discharge of a fellow worker and, when informed he would soon talk with them, they resumed their work; in *NLRB v. Cowles Pub. Co.*, 214 F. 2d 708, 710 (9th Cir. 1954), the court found "there is no dispute that the strike was in support of specified demands for a raise in pay and for improved working conditions, submitted to the employer prior to striking"; in *NLRB v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (6th Cir. 1953), *aff'd on rehearing*, 210 F. 2d 824, 825 (1954), the court found that "[m]anagement was advised of the reason for the stoppage and gave no satisfactory response"; in *Modern Motors, Inc. v. NLRB*, 198 F. 2d 925 (8th Cir. 1952), prior to quitting work over a disputed bonus payment, the employees discussed their grievance directly in a meeting with the company president; in *Cuseno v. NLRB*, 190 F. 2d 898 (3d Cir. 1951), before leaving work to protest the discharge of a fellow worker, the employees had negotiated for a consent election and had taken an open strike vote, the very knowledge of which had prompted the employer's president to address them in a body at the plant; in *NLRB v. Kennametal, Inc.*, 182 F. 2d 817 (3rd Cir. 1950), the employees stopped work and went directly to the company cafeteria where they discussed a demanded wage increase with their company president; in *Gullett Gin Co. v. NLRB*, 179 F. 2d 499 (5th Cir. 1950), the employees were discharged in the very midst of a meeting with management discussing a proposal for increased wages; in *Home Beneficial Life Ins. Co. v. NLRB*, 159 F. 2d 280 (4th Cir. 1947), the employees' union had extensively negotiated working hour arrangements and the concerted activities were commenced only after the employer had refused to accede to the

case, without any sort of demand on the company, the involved employees summarily left their place of employment. Under such circumstances, it would be to disregard the obligation to present a demand for peaceful settlement, and contrary to the fundamental purposes of collective bargaining, to hold the employees' unilateral action a protected concerted activity. Where certain employees had refused to enter their place of employment without first making known the reason for such refusal or requesting any concession of their employer, in *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457, 465 (2nd Cir. 1958), the court said:

"The duty to bargain collectively is but a facet of the underlying purpose of the entire Act in promoting and encouraging the peaceful settlement of labor disputes. Placing the activity here under the broad protection of section 7 would clearly frustrate that purpose. To hold that those engaging in a strike had an unfettered right to refuse not only to discuss their grievances but even to name them would, far from promoting the peaceful settlement of labor disputes, inject a judicially fashioned element of chaos into the field of labor relations. The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace."

"We do not hold as a matter of law that employees engaging in concerted activities must give formal or even informal notice of their purpose. However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they choose to remain silent, bear the risk of being discharged."

union demands and after the union had given notice of the pending concerted actions; and in *Fifth Carpet Co. v. NLRB*, 129 F.2d 633 (2d Cir. 1942), the employees left work only after they had negotiated for certain guaranteed overtime pay with the shop chairman and their foreman, and after management had refused the requested guaranty.

We believe this principle particularly applicable where, as here, the cause of the objectionable condition was largely fortuitous and substantially beyond the control of [fol. 266] the employer and was of but brief duration, and where, even beyond the neglected opportunity for inquiry, negotiation and settlement, effective measures had been taken by the employer before the protest was even staged. The company was afforded no opportunity to avoid the work stoppage by granting a concession to a demand of the employees.

The National Labor Relations Act has for one of its objectives the protection of employees in freely negotiating concerning unsatisfactory plant conditions and other conditions of employment without fear of reprisal, but the purpose of the act was not to guarantee to the employees the right to do as they please under any given set of circumstances and in total disregard of the obligations of their employment. In the instant case, regular production schedules involving "critical" purchase orders were disrupted; to do the work of those who absented themselves, employees were transferred from their regular jobs in other departments and there is no evidence that any of those so substituting suffered any ill effects other than temporary discomfort. With no reasonable justification, the employees left their jobs without first having obtained the necessary permission. In a situation where several employees, unprotected against the elements, left work early with the permission of the foreman and were later discharged by higher management on the basis of the foreman's report that they had left without permission, the Board held that since the basis for the discharges was a good faith belief that permission to leave had not been obtained, the discharges could not be said to have been discriminatory or an unfair labor practice in violation of the act. Scott Lumber Co., 109 N.L.R.B. 1373 (1954). In the instant case, the company is not to be held guilty of [fol. 267] an unfair labor practice for having discharged employees who had in fact left their jobs without permission in violation of a well known company rule. Under these circumstances, we conclude that the discharges were not, in any sense, discriminatory and were not without

justification; also, by reason of their failure to present a grievance to the company, the employees were not engaging in a protected activity since they were not acting in concert for their mutual aid or protection in withholding their services.

The final issue presented is the Board's finding that the company had refused to bargain in good faith with a union elected by the determinative counting of challenged ballots cast by four of the employees previously discharged for having participated in the January 5, 1959, walkout in violation of sections 8(a)(1) and 8(a)(5) of the act.¹¹ Having previously concluded the men casting

¹¹ The first tally made of the March 17, 1959, consent election resulted in 68 votes in favor of the proposed union, the Industrial Union of Marine & Shipbuilding Workers of America, and 70 votes against such union with five votes challenged and one held void by the Board agent. Four of the challenged ballots were those cast by employees discharged for participating in the January 5, 1959, walkout, Affayroux, Heinlein, Hovis and Olshinsky. The Board's Regional Director later recommended the allegedly void ballot be counted as a "Yes" vote in favor of the union. The revised tally then stood at 69 votes in favor and 70 votes opposed to the union. The Regional Director also recommended that the ballot of one Dicus, who was initially challenged as being a supervisor under the terms of the act, be counted. With the addition of the Dicus ballot, the result would then have been either 69 to 71 against union representation or would have been a tie vote. In either case, the union would not have received a majority of the ballots cast and the Board acknowledges the result of the election depends on the validity of the four ballots cast by the above walkouts. The Regional Director recommended that these challenges be determined together with the unfair labor practice charges pending in respect to the voters' discharges. When the Board on March 31, 1960, held that the discharges had in fact been unfair and that the voters had thus retained the status of employees through the time of the election, all challenged ballots were tabulated resulting in a final count of 73 votes in favor of the union with 71 opposed. The union was certified on April 13, 1960, and on April 21 the company, by letter to the union, stated that "pending the outcome" of the instant proceeding, it was "not in a position to sit down with the Union and negotiate a contract." On August 16, 1960, the Board held the company's letter constituted an admission of a refusal to bargain in good faith, and further affirmed its prior decision that employees participating in the walkout had been unfairly discharged.

[fol. 268] these determinative ballots were properly discharged for cause on January 5, 1959, prior to the eligibility period for the representation election, the week ending February 2, 1959, it necessarily follows that the union's status as the certified representative of the employees, dependent as it is upon the validity of these ballots, must fail. Since the union has thus failed to carry the representation election, the Board's order directing the company to bargain in good faith with that union will be denied enforcement, and the Board's certification of that union will be vacated and set aside. *Ohio Power Co. v. NLRB*, 176 F. 2d 385, 388 (6th Cir. 1949).

Enforcement denied.

[fol. 269] **SOBELOFF**, Chief Judge, dissenting:

The Labor Board's position is neither unsupported by the record nor unreasonable, and I find no warrant for refusing enforcement of its order. The evidence at the hearing clearly furnishes a foundation for the Board's conclusion that the walkout of the seven employees constituted concerted activity protesting the unsatisfactory working conditions in the machine shop. Whatever notice or demand upon the employer might be required in other circumstances need not be decided, for no additional notice or demand was necessary under the well supported findings of this case.

The employer's contention that the activities of these men did not amount to concerted activity is refuted by the findings of the Examiner and the Board, based upon testimony of the employees. The Board states:

"The Trial Examiner found, and we agree, that the Respondent violated Section 8(a)(1) in terminating the employment of the 7 complainants who were engaged in protected concerted activity under the Act. We rely, *inter alia*, upon the following: the credited testimony of employee Hovis that 'We all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant

that way;' the credited testimony of employees Heinlein, Caron and George as to previous complaints made to the Respondent's foreman over the cold working conditions, and to the effect that the men left on the morning of January 5 in protest of the coldness at the plant; and the evidence that the 7 complainants left the shop at approximately the same time."

[fol. 270] My brethren apparently agree that if there had been a notice or demand, the walkout would be concerted activity protected by the Act. However, the court denies enforcement because, it is said, "An important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer." There was, however, such notice to the employer in the instant case.¹ On a number of earlier occasions complaints had been made about the lack of heat in the shop. On the morning of the walkout, employee Caron discussed the coldness with the foreman, Jarvis. Also, as the men were walking out, they told Jarvis that it was too cold to remain and work.

Furthermore, the employer, through its foreman, indicated that the men should go home. Jarvis told Caron: "If those fellows had any guts at all, they would go home." When Caron reported back to the men, he told them that the foreman had suggested that they leave. Under these circumstances it is plainly improper to upset the Board's decision.

¹ That notice of the reasons for concerted activity need not follow any prescribed form is clearly shown by the second of the two paragraphs quoted in the court's opinion from *N.L.R.B. v. Ford Radio & Mica Corp.*, 258 F.2d 457, 465 (2nd Cir., 1958). There, unlike the present case, management did not precipitously fire employees. It took action only after futile attempts to learn the cause of the employees' grievance. In the instant case, by no stretch of the facts was management "placed in the position of having to guess at its peril the purpose behind the strike." *id.*, page 464.

[fol. 271]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

*On Petition for Enforcement of Orders of the
National Labor Relations Board*

JUDGMENT—Filed and Entered June 3, 1961

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of certain orders issued by it against the Washington Aluminum Company, Inc., its officers, agents, successors, and assigns, on the 31st day of March, 1960, and the 16th day of August, 1960, in proceedings before the said Board known upon the records of the Board as Cases Nos. 5-CA-1498 and 5-CA-1696, respectively; upon the answer of the respondent; and upon the transcript of the record in said proceedings, certified and filed in this court; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition for enforcement be, and it is hereby, denied, and that the Board's certification of the union be vacated and set aside, in accordance with

[fol. 272] the opinion of the Court filed herein.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

I dissent:

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

July 5, 1961, certified copy of decree transmitted to the
National Labor Relations Board.

[fol. 273] Clerk's Certificate to foregoing
transcript omitted in printing

[fol. 274]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—August 30, 1961

UPON CONSIDERATION of the application of counsel for
petitioner,

It Is ORDERED that the time for filing petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including

October 2nd, 1961.

/s/ Hugo L. Black
Associate Justice of the Supreme
Court of the United States.

Dated this 30th day of August, 1961.

[fol. 275]

SUPREME COURT OF THE UNITED STATES**No. 464, October Term, 1961****NATIONAL LABOR RELATIONS BOARD, PETITIONER****vs.****WASHINGTON ALUMINUM COMPANY****ORDER ALLOWING CERTIORARI—December 4, 1961**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.